employees to take a diversity, equity, and inclusion training. To be mindful of cost, they can use one of several free online courses.[1] Furthermore, they should update their policies to include ADA guidelines about questions that employees are legally permitted to ask patrons with service animals.[2] Finally, at future pop-up events they should require the food truck to park in their unused parking lot to mitigate concerns about food contamination, and hire one additional staff member at Marion County's $12.75 per hour minimum wage[3] to clean potential messes. *Id.* at 12. Such modifications will allow Books & Brews Salem LLC to continue to serve their clients without undue fear of future discrimination claims.

PLEDGE OF HONESTY

On my honor, I submit this work in good faith and pledge that I have neither given nor received improper aid in its completion. /s/ 1131

[1] *10 free online courses on diversity, equity, and inclusion to sign up for right now that will make you a better leader*, Business Insider, https://www.businessinsider.com/free-online-courses-diversity-equity-inclusion-2020-10 (last visited Nov. 30, 2021).
[2] *Service Animals*, ADA.gov, https://www.ada.gov/service_animals_2010.htm (last visited Nov. 30, 2021).
[3] *Oregon Minimum Wage*, Oregon Bureau of Labor and Industry, https://www.oregon.gov/boli/workers/pages/minimum-wage.aspx (last visited Nov. 30, 2021)

Applicant Details

First Name	**Connor**
Middle Initial	**O**
Last Name	**Sakati**
Citizenship Status	**U. S. Citizen**
Email Address	**cos10@duke.edu**
Address	**Address** Street **910 Constitution Drive** City **Duram** State/Territory **North Carolina** Zip **27705** Country **United States**
Contact Phone Number	**6036895889**

Applicant Education

BA/BS From	**Georgetown University**
Date of BA/BS	**May 2018**
JD/LLB From	**Duke University School of Law** **https://law.duke.edu/career/**
Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Alaska Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Meyer, Tim
meyer@law.duke.edu
919-613-7014
Roady, Steve
sroady@duke.edu
919-613-7061
Nowlin, Michelle
Nowlin@law.duke.edu
919-613-8502

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Connor Sakati
910 Constitution Drive, Apt. 812
Durham, NC 27705

The Honorable Judge Jamar K. Walker
United States District Court, Eastern District of Virginia
Norfolk, VA 23510

Dear Judge Walker,

I am applying to serve as your clerk for the 2024-25 term. I am a former Teach for America teacher, joint degree student at Duke Law School, and United States Army Reserve officer candidate. I aim to leverage my legal training to help shape rural development, natural resources, and energy law and policy. To that end, clerking would help me deepen my understanding of the litigation process while also broadly exposing me to new legal issues. Additionally, half my family lives scattered across Virginia, and my partner grew up in the state; I would greatly enjoy clerking near both my family and hers. I am most interested in a one-year clerkship.

My experience teaching and volunteering would make me an effective clerk in your chambers. As the only biology, ecology, and geology high school teacher in a rural school district, I managed over one hundred students (and the reams of paper) that came through my door each day while also independently developing a curriculum for each course. Additionally, as a *Guardian Ad Litem*, I made parental custody and social services recommendations for children in abuse, neglect, and dependency court. Moreover, while volunteering in wilderness emergency services, I have learned to operate under pressure.

Throughout graduate school, I focused on developing strong writing skills, learning to conduct scholarly research, and publishing my own work. Thus, I elected to write eight term papers during my second year of law school while also enrolling in writing-intensive seminars at the Sanford School of Public Policy. I even carried a copy of Ross Gruberman's *Point Made* through the Fort Knox mud and thunderstorms during a monthlong field training. These efforts bore fruit; last semester, the Alaska Law Review published my first paper; another is forthcoming as a chapter of an Environmental Law Institute report. Following recommendations from my professors, I have submitted two other papers for publication in law reviews.

Enclosed please find my resume, transcripts, and writing sample; letters of recommendation from Professors Timothy Meyer, Michelle Nowlin, and Stephen Roady will follow. Please contact me at either connor.sakati@duke.edu or 603-689-5889 if you have any questions regarding my application. Additionally, between July 15 and August 16 I am attending an Army field training at Fort Knox; I apologize in advance for any delayed responses during that time.

Thank you very much for your time and your consideration,

Connor Sakati

CONNOR SAKATI
910 Constitution Drive, Apt. 812, Durham NC 27705 | connor.sakati@duke.edu | 603-689-5889

EDUCATION

Duke University School of Law and Sanford School of Public Policy, Durham, NC
Juris Doctor, Master of Public Policy, Certificate in International Development Economics, expected May 2024
GPA: 3.67 (J.D.), 3.87 (M.P.P.)
Journal: Alaska Law Review, *Executive Board*, *Executive Development Editor*
Military: U.S. Army Reserve Officer's Training Corps (*Officer Candidate*, expected commissioning 2024)
Pro Bono: North Carolina Guardian *Ad Litem*, Innocence Project, Prison Water Quality Monitoring Project
Consulting: North Carolina Office of Rural Health (co-authored rural hospital payment reform report)
Leadership: Government and Public Service Society, *President*
Faculty Public Interest Law Committee, *Student Representative*
Law School Dean's Advisory Council, *Member*
Durham Literacy Center, *Board Member*
Publication: *Fishing in the Desert: Modernizing Alaskan Salmon Management to Protect Fisheries and Preserve Fishers' Livelihoods*, 40 Alaska Law Review 137–69 (2023)

Georgetown University School of Foreign Service, Washington, DC
Bachelor of Science in Foreign Service, Minor in French, *magna cum laude*, May 2018
GPA: 3.87
Honors*:* French, History, and Political Science National Honors Societies
Study Aboard*:* Science Po Paris Exchange Program, Paris, France, Fall 2016

EXPERIENCE

U.S. Department of Justice, **Environment and Natural Resources Division**, Denver, CO
Law Clerk, May 2023 – Present
Member of a case team litigating environmental enforcement actions involving multiple antipollution statutes. Researched procedural issues for multiparty civil litigation and novel applications of environmental law to internet companies. Additionally, I interned with the Environmental Crimes Section in 2017.

Alaska Attorney General's Office, Anchorage, AK
Law Clerk, May 2022 – July 2022
Assisted with environmental, criminal environmental enforcement, public agency law, and sex crimes cases. Independently researched, drafted, and edited motions to dismiss, discovery motions, and a response. Presented original legal research during client meetings and recommended legal strategies, including to the Attorney General.

U.S. Department of State, **International Narcotics and Law Enforcement Affairs**, Washington, DC
Graduate Intern, June 2021 – September 2021
Assisted a team designing and implementing judicial reform and rule of law programming. Authored briefings and talking points for officials, including the Deputy Assistant Secretary. Researched Balkan and Central Asian legal reform issues while helping to develop new programming concepts. Volunteered on Afghan evacuation task force.

Teach for America Appalachia (Harlan High School), Harlan, KY
High School Science Teacher, August 2018 – May 2020
One of two state-licensed science teachers in the school district. Independently taught over one hundred students and developed a standards-aligned curriculum for earth science, biology, and anatomy courses. Coached Boys and Girls Cross Country and Track teams, including a state-meet qualifying team.

Federal Bureau of Investigation, **Criminal Division**, Boston, MA
Honors Intern, June 2016 – August 2016
Assigned to a transnational organized crime task force. Supported active investigations by analyzing evidence and multisource intelligence, building presentations, and briefing Intelligence Analysts and Special Agents.

ADDITIONAL INFORMATION

Languages: French (Proficient), German (12 Credits), Turkish (12 Credits).

Activities and Interests: Orange County Technical Rescue Team Member (wilderness search and rescue, swift water rescue, flooding response). Former Ski Patroller. Avid Skier and Hiker.

DUKE UNIVERSITY - Unofficial Transcript

Name: **Connor Ossama Sakati** **6/9/2023**
Student ID: **2610434**

Academic Program History

Program: **Law School**
(*Status: Active in Program*)
Plan: **Law (JD)** *(Primary)*
Subplan:

Beginning of Law School Record

2021 Fall Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	110	CIVIL PROCEDURE	4.500	4.0	GRD
LAW	130	CONTRACTS	4.500	3.3	GRD
LAW	160A	LEGAL ANLY/RESEARCH/WRIT	0.000	CR	CNC
LAW	180	TORTS	4.500	4.0	GRD

Term GPA: 3.766 Term Earned: 13.500

Cum GPA: 3.766 Cum Earned: 13.500

2022 Winter Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	857	LAWYERING/EXECUTIVE BRANCH	0.500	CR	CNC
Course Topic:		**Reserved for 1Ls and LLMs**			
LAW	864	LAWYERING: INT'L DEVELOPMENT	0.500	CR	CNC

Term GPA: 0.000 Term Earned: 1.000

Cum GPA: 3.766 Cum Earned: 14.500

2022 Spring Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	120	CONSTITUTIONAL LAW	4.500	3.2	GRD
LAW	140	CRIMINAL LAW	4.500	3.3	GRD
LAW	160B	LEGAL ANLY/RESEARCH/WRIT	4.000	3.3	GRD
LAW	170	PROPERTY	4.000	3.7	GRD

Term GPA: 3.367 Term Earned: 17.000

Cum GPA: 3.544 Cum Earned: 31.500

2022 Summer Term 2

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	614	JD PROFESSIONAL DEVELOPMENT	0.000	CR	PFI

Term GPA: 0.000 Term Earned: 0.000

Cum GPA: 3.544 Cum Earned: 31.500

DUKE UNIVERSITY - Unofficial Transcript

Name: **Connor Ossama Sakati** **6/9/2023**
Student ID: **2610434**

2022 Fall Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	218	COMPARATIVE LAW	3.000	4.0	GRD
LAW	368	NATURAL RESOURCES LAW	2.000	4.0	GRD
LAW	566	INTERNATL ENVIRONMENTAL LAW	2.000	4.0	GRD
LAW	582	NATIONAL SECURITY LAW	3.000	3.5	GRD
LAW	621	EXTERNSHIP	2.000	CR	CNC
LAW	621S	EXTERNSHIP SEMINAR	1.000	P	PHF
LAW	628	JD LEGAL WRITING	0.000		NOG
Course Topic:		**Track upper-level writing req.**			
LAW	647	US/CANADA MARINE LIFE GOVT RE	3.000	3.7	GRD
MILITSCI	91L	LEADERSHIP LABORATORY: FALL	0.000	P*	PFP
MILITSCI	301	TRNING MGMT/WARFIGHTING FNCTNS	0.000	A+*	GPN

Term GPA: 3.815 Term Earned: 16.000

Cum GPA: 3.625 Cum Earned: 47.500

2023 Spring Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	200	ADMINISTRATIVE LAW	3.000	3.8	GRD
LAW	245	EVIDENCE	3.000	3.6	GRD
LAW	320	WATER RESOURCES LAW	2.000	4.3	GRD
LAW	361	INTERNATIONAL TRADE LAW	3.000	3.5	GRD
LAW	422	CRIMINAL TRIAL PRACTICE	3.000	3.9	GRD
LAW	604	AD HOC TUTORIAL (TOPICS)	1.000	CR	CNC
Course Topic:		**Election Law**			
LAW	640	INDEPENDENT RESEARCH	1.000	4.0	GRD
MILITSCI	92L	LEADERSHIP LABORATORY: SPRING	0.000	P*	PFP
MILITSCI	302S	APP LEADERSHIP/SMALL UNIT OPS	0.000	A+*	GPN

Term GPA: 3.800 Term Earned: 16.000

Cum GPA: 3.670 Cum Earned: 63.500

2023 Summer Term 2

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	614	JD PROFESSIONAL DEVELOPMENT	0.000		PFI

Term GPA: 0.000 Term Earned: 0.000

Cum GPA: 3.670 Cum Earned: 63.500

Law School Career Earned

Cum GPA: 3.670 Cum Earned: 63.500

DUKE UNIVERSITY - Unofficial Transcript

Name: **Connor Ossama Sakati** **6/9/2023**
Student ID: **2610434**

Academic Program History

Program: **Public Policy**
(*Status: Active in Program*)
Plan: **Public Policy - Master's** *(Primary)*
Subplan:
Subplan: **International Development Policy** *Concentration*

Beginning of School of Public Policy Record

2020 Fall Term

Course		Description	Units Earned	Official Grade	Grading Basis
CONTPPS	1	COURSE CONTINUATION	0.000		NOG
PUBPOL	800	CAREER & PROF SKILL DEV	0.000	-	NOG
PUBPOL	803	POLICY ANALYSIS I	3.000	A-	GRD
PUBPOL	811D	MICROECO: POLICY APPL	3.000	A	GRD
PUBPOL	812	STATISTICS FOR POLICY MAKERS	3.000	A	GRD
PUBPOL	820	GLOBALIZATION/GOVERNANCE	3.000	A-	GRD
PUBPOL	890	SPECIAL TOPICS	3.000	A	GRD
Course Topic:		**INTERNATIONAL DEVELOPMENT**			
PUBPOL	890-1	INTRO SPECIAL TOPICS SKILLS	0.000	-	NOG
Course Topic:		**EXCEL FOUNDATIONS**			

Term GPA: 3.880 Term Earned: 15.000

Cum GPA: 3.880 Cum Earned: 15.000

2021 Spring Term

Course		Description	Units Earned	Official Grade	Grading Basis
PUBPOL	764	GOVERNANCE AND DEVELOPMENT	3.000	A	GRD
PUBPOL	778	FISC DECENTRAL/LOCAL GOVT FIN	3.000	A	GRD
PUBPOL	804	POLICY ANALYSIS II	3.000	B+	GRD
PUBPOL	813	QUANTITATIVE EVAL METH	3.000	A+	GRD
PUBPOL	830	SPECIAL TOPICS MODULE	1.500	A	GRD
Course Topic:		**MODERN CONSERVATISM & POLICY**			
PUBPOL	830	SPECIAL TOPICS MODULE	1.500	A	GRD
Course Topic:		**NC POLITICS & POLICY**			

Term GPA: 3.860 Term Earned: 15.000

Cum GPA: 3.870 Cum Earned: 30.000

2021 Summer Term 1

Course		Description	Units Earned	Official Grade	Grading Basis
PUBPOL	802	GRADUATE SUMMER INTERNSHIP	0.000	CR	CNC

Term GPA: 0.000 Term Earned: 0.000

Cum GPA: 3.870 Cum Earned: 30.000

DUKE UNIVERSITY - Unofficial Transcript

Name: **Connor Ossama Sakati** **6/9/2023**
Student ID: **2610434**

2023 Fall Term

Course		Description	Units Earned	Official Grade	Grading Basis
PUBPOL	790	SPECIAL TOPICS IN IDP	0.000		GRD
Course Topic:		**POLITICAL ECONOMY IN SSA & MN**			
PUBPOL	890	SPECIAL TOPICS	0.000		GRD
Course Topic:		**INTERNATIONAL POLITICAL ECO**			

Term GPA: 0.000 Term Earned: 0.000

Cum GPA: 3.870 Cum Earned: 30.000

School of Public Policy Career Earned

Cum GPA: 3.870 Cum Earned: 30.000

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 26, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Connor Sakati

Dear Judge Walker:

I write with great enthusiasm to recommend Connor Sakati for a clerkship in your chambers. Connor is one of my favorite students from my almost-15 years of teaching. He is bright and hard-working, but more than that, he is willing to take contrary positions when he thinks he is right, he is able to disagree agreeably, he is persuasive and thoughtful, and he is an all-around delightful person to talk to. He is also one of the most socially aware students I can recall in his personal dealings with others and the most committed to public service. In short, Connor is the student I am most happy to write a letter for this year (or in the last several years, for that matter). He will make an excellent law clerk and lawyer.

I met Connor in August 2022 when he enrolled in my International Environmental Law class. Broadly speaking, the class covers three units: 1) the design and negotiation of international environmental treaties; 2) principles of international environmental law (e.g., rules on environmental impact assessment, the precautionary principle); and 3) discrete issues in international environmental law (e.g., oceans law, ozone depletion, climate change). The class is discussion-based, rather than lecture-based, which means that students do most of the talking. This particular section had only nine students, which meant that each student's participation was critical to making the discussion a success.

Connor was the best student (and received the highest grade) in the class. Connor showed up to each class having thought about the reading and, if I had to guess, having played in his head the devil's advocate to the positions taken in the reading. This preparation meant that Connor was able to critique the material constructively and offer points of view dismissed or not presented in the reading. For example, at several points Connor argued that unilateral environmental measures (such as carbon border adjustments, i.e., carbon tariffs) might be necessary given the lack of adequate progress in multilateral negotiations. In our discussion of biodiversity protection, Connor pointed out that requiring conservation without aligning economic incentives was likely to fail, contrary to a number of his classmates who favored a more top-down regulatory approach that is likely to be difficult to administer in developing countries. A common thread was Connor's unwillingness to simply accept that the multilateral treatymaking process necessarily produced good outcomes. Throughout these discussions, Connor expressed himself thoughtfully and respectfully, especially when he was disagreeing with others. He is the kind of person that will shine both in collaborative settings and when facing off against opposing counsel.

Connor's final paper for the class, on a legal regime for fishing in contested Arctic waters, was equally good. Connor's writing style is easy and accessible, and his analysis of legal problems is sharp. Students submitted both a rough draft and a final draft. I was particularly impressed by Connor's ability to take constructive criticism and use it to make his paper better. Connor's rough draft was the best draft I received, both in the sense of being the most complete and the best written. I gave Connor a number of suggestions, especially on how to write for a non-expert audience and how to refine his proposal to resolve jurisdictional difficulties in Arctic. Connor implemented the suggestions very effectively. I would say that, despite having the best draft to start with, Connor's paper also showed the most improvement from rough to final draft. Connor submitted the paper not only in satisfaction of his course requirement, but he also submitted it as part of an application to be a Salzburg Cutler Fellow, a program that brings together four students interested in international affairs from each of the top 15 law schools in the country. His paper was selected, and Connor attended the program in Washington, D.C., as one of Duke's representatives.

In the spring of 2023, Connor enrolled in my International Trade Law class, which covers both U.S. trade law and the law of the World Trade Organization. Connor received a 3.5 in the class (roughly an A- on Duke's scale) based on a final exam. Connor's performance in class was exactly what I would have expected. He easily mastered a range of legal and economic concepts, and he was especially thoughtful about the tradeoffs involved in applying trade law doctrines (such as economic discrimination or national security exceptions) broadly versus narrowly. He was a regular participant in class discussions and unlike many students in law school classes, his contributions to discussions were not soapbox speeches; rather, they were genuine engagements with what other students had said. To my mind, his approach to class showed a generosity of spirit toward his students, as well as the ability to adapt his thoughts to the flow of a debate.

Finally, I would be remiss if I did not note what a fine person Connor is. I serve as Connor's adviser in the Public Interest Public Service (PIPS) program. In that role, I have had the chance to get to know Connor outside of class and the opportunity to speak to him at length about his career. Connor is as committed to a career in public service as any student I have known, and equally suited to one. The son of a soldier, Connor is pursuing a commission as an officer in the Army Reserve. Doing so is not easy, as it requires him to undertake additional training during law school. Connor will also obtain a master's in public policy during his time

Tim Meyer - meyer@law.duke.edu - 919-613-7014

at Duke, focusing on development economics. His interest in public policy is broad, with a particular interest in environmental issues, so I am not sure exactly what field of law he will practice in. I am confident, though, that whichever direction he goes, he will have a major impact.

If I can be of any further assistance, please do not hesitate to let me know.

Best,

Tim Meyer
Richard Allen/Cravath Distinguished Professor in International Business Law
Co-Director, Center for International and Comparative Law

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 26, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Connor Sakati

Dear Judge Walker:

I write to offer my recommendation of Connor Sakati for a clerkship in your chambers. Throughout the current academic year, I have worked closely with Connor in three different settings – a small research tutorial, an independent study, and a faculty advisory committee – that offered me ample opportunity to get to know him, observe his work with others, and evaluate his performance. In each setting, Connor has impressed me (and others) with his intellect, leadership abilities, and the quality of his character. I have tremendous regard for him and offer him my unequivocal support.

Last semester, I supervised Connor in a small, six-student research tutorial in preparation for a binational workshop of government officials and scientists focused on governance and protection of migratory marine species. As part of the tutorial, students conducted extensive independent legal and factual research, produced background reports for workshop participants, served as rapporteurs for the two day workshop, and collaborated on a report summarizing the proceedings and recommendations. Through this work, Connor became quite interested in challenges to bilateral cooperation and governance and is now conducting an independent study to explore comparative approaches in more detail. In addition, Connor serves as a student representative to the Faculty Advisory Committee for Public Interest and Pro Bono (PIPB) at Duke Law School, for which I serve as Faculty Chair.

Connor's intellectual curiosity and maturity were evident from the first meeting of our research tutorial. He volunteered to undertake research into federal environmental laws and fisheries management, engaged actively with experts in the field who came in as guest speakers, asked probative questions, and helped his classmates analyze findings from their own research. He proved adept at researching unfamiliar legal topics quickly and thoroughly and explaining them clearly and succinctly. He also capably distilled their most important aspects and explained them orally and in writing to a non-legal (and indeed, foreign) audience. Remarkably, Connor did this work despite a heavy course load and significant extracurricular commitments to the Alaska Law Journal, the Government and Public Service Society (GPS), and other activities. Connor's skill in managing his time and focusing his energy is quite remarkable.

Connor is able to leverage his intellectual and analytical skills as both a member and a leader of a team. During our research tutorial, all six students worked as a co-author team, setting deadlines and forming team expectations. Connor facilitated many of the conversations, bringing the team to agreement on a work plan and a schedule. He worked with students across disciplines (three members of the tutorial were law students, three were master's students in environmental science policy), helping environmental students understand the law and learning from environmental students about their discipline's methodologies and jargon. He also volunteered to help other students with their research when they fell behind, ensuring the entire project met its deadlines. Connor's leadership skills are evident in his work on the PIPB committee, as well. He serves as an active liaison to the public service-oriented student body, effectively advocating for improvements to the program. More impressive, however, are the times he has challenged proposals from faculty and staff that he believes would undermine the intent and service of the program. Connor raises important questions diplomatically, and his ability to respectfully present his perspective and analysis carries force.

Finally, Connor is a person of strong moral character, committed to public service in both his professional goals and his outside interests. Connor actively seeks to engage his peers in improving access to legal services, regardless of their specific career paths. He currently leads the Government and Public Service Society, one of the largest student organizations at our school. In that capacity, Connor has advocated to and sought out the opinions of the public interest faculty, earnestly working to improve the school's support for public interest students. He has been involved in advocacy to improve LRAP funding, and successfully worked with the Public Interest and Pro Bono efforts to expand access for 2L summer funding and increase public interest programming. He has volunteered with ski patrol search and rescue efforts, and here in his law school home of the Piedmont of North Carolina, he volunteers as an EMT in wilderness search and rescue.

Connor aspires to work for the government, ideally for the Department of Justice. In addition to the contributions he would make to your chambers, a clerkship would provide him with the opportunity to gain firsthand experience with the complexities and nuances of litigation and develop models of effective advocacy. I offer him my strongest recommendation for this clerkship.

Michelle Nowlin - Nowlin@law.duke.edu - 919-613-8502

Please let me know if you have any questions about Connor's qualifications.

With kind regards,

Michelle Benedict Nowlin
Clinical Professor of Law
Co-Director, Environmental Law and Policy Clinic

Policing the Exception: Balancing Government Effectiveness and Liberty through Insurrection Act Reform[1]

By Connor Sakati

"I am pleading to you, as President of the United States, in the interest of humanity, law, and order and because of democracy worldwide, to provide the necessary federal troops within several hours."[2] Seldom does a mayor plead the President of the United States to send the military to his city, as Little Rock Mayor Woodrow Wilson Mann did on September 24, 1957.[3] However, on that day, Mayor Mann faced a mob blocking nine black high school students from attending class at the all-white Little Rock Central High School, openly defying the Supreme Court's ruling in *Brown v. Board of Education*[4] requiring schools to racially integrate.[5] Arkansas Governor Orval Faubus refused to help enforce the law; he too scorned the decision and even ordered nearly three hundred Arkansas National Guard soldiers to help the mob blockade the students from their new school.[6] Faced with the breakdown of order in his city, Mayor Mann realized that only the federal military could enforce federal law and protect the schoolchildren.

President Dwight Eisenhower famously granted Mayor Mann's request, placing the Arkansas National Guard under federal control and deploying soldiers from the United States Army's 101st Airborne Division, bayonets affixed to their rifles,[7] to escort the nine children to

[1] I excerpted this writing sample from a forty-page term paper I wrote for my National Security Law seminar.
[2] Telegram from Woodrow Wilson Mann, Mayor, Little Rock, to Dwight D. Eisenhower, President (Sept. 24, 1957) (on file with the Dwight D. Eisenhower Presidential Library, Museum, and Boyhood Home), https://www.eisenhowerlibrary.gov/sites/default/files/research/online-documents/civil-rights-little-rock/1957-09-24-mann-to-dde.pdf (punctuation and capitalization added) [hereinafter Mann Telegram].
[3] *Id.*
[4] 347 U.S. 483, 495 (1954) (holding that "[s]eparate educational facilities are inherently unequal" and that segregated schools therefore deprived plaintiffs of the equal protection of the law).
[5] Mann Telegram, *supra* note 2; Relman Morin, *AP Was There: Paratroops With Bayonets Escort Little Rock Nine*, ASSOCIATED PRESS (Sept. 24, 2017), https://apnews.com/article/360439e805eb4db180fbfd52a7a0f5bb.
[6] Gerald Jaynes, *Little Rock Nine*, BRITANNICA, https://www.britannica.com/topic/Little-Rock-Nine (last updated May 17, 2023).
[7] Morin, *supra* note 5.

their school and end mob rule.[8] For authority, President Eisenhower relied on a statute, now codified at 10 U.S.C. §§ 251–55[9] and colloquially termed the Insurrection Act, that is an exception to the general rule barring federal military forces from participating in domestic civil law enforcement.[10] The Insurrection Act grants the President the authority to provide "Federal [military] aid for State governments,"[11] use "the militia and armed forces to enforce Federal authority,"[12] and deploy military forces to stop "[i]nterference with State and Federal law."[13] These broad powers endow the President with discretionary authority; only § 251 requires the approval of another government institution, a state government, before its invocation.[14]

Federal troops rarely enforce domestic law in the United States.[15] Deployed to Little Rock, United States Army Lieutenant Damron noted "the astonishment and bewilderment on many faces" as his convoy rolled though the city.[16] Residents who associated the United States Army and the 101st Airborne Division with battles abroad were "mostly stunned by the military presence."[17]

The astonishment of Little Rock's residents is unsurprising. Americans possess "a traditional and strong resistance . . . to any military intrusion into civilian affairs."[18] This

[8] Gregory Frye, *Army Commemorates 1957 Little Rock Deployment*, U.S. ARMY (Sept. 19, 2011), https://www.army.mil/article/4897/army_commemorates_1957_little_rock_deployment.
[9] Mann Telegram, *supra* note 2.
[10] *See* 18 U.S.C. § 1385 (criminalizing any domestic use of the armed forces to enforce the law not otherwise authorized).
[11] 10 U.S.C. § 251.
[12] 10 U.S.C. § 252.
[13] 10 U.S.C. § 253.
[14] *See* 10 U.S.C. §§ 251–55 (granting the President discretionary authority to deploy troops in many domestic circumstances).
[15] *See* Michael Rouland & Christian Fearer, *Calling Forth the Military: A Brief History of the Insurrection Act*, NAT'L DEF. U. PRESS (Nov. 19, 2020), https://ndupress.ndu.edu/Media/News/News-Article-View/Article/2421411/calling-forth-the-military-a-brief-history-of-the-insurrection-act/ (describing the few Insurrection Act invocations in recent history).
[16] Frye, *supra* note 8.
[17] *Id.*
[18] Laird v. Tatum, 408 U.S. 1, 15 (1972).

skepticism "has deep roots in our history," tracing itself to our nation's revolution and finding "early expression, for example, in the Third Amendment's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military."[19] The Declaration of Independence protested, in part, King George III's move "to render the Military independent of and superior to the Civil Power."[20]

Nevertheless, some exceptionally rare circumstances, like Little Rock in 1957, require the Insurrection Act's break with tradition and expectations. There, state government had flaunted federal authority, depriving citizens of their rights through the state's own National Guard forces. Who else but federal troops could restore order, protect liberty, and give effect to the words in *Brown*? Similarly, during Reconstruction, the Insurrection Act played a key role in suppressing a militia battling for the Arkansas governorship and subduing a white mob "massacr[ing]" black citizens in Vicksburg.[21] More recently, Presidents have invoked the Act in response to major disturbances and civil unrest like the 1992 Los Angeles Riots.[22]

Here, I omit a section outlining my argument and reform proposals, which draw on international law of armed conflict principles and contemporary German constitutional practice.

[19] *Id.*; *see also* ELIZABETH GOITEIN & JOSEPH NUNN, BRENNAN CTR. FOR JUST., THE INSURRECTION ACT: ITS HISTORY, FLAWS, AND A PROPOSAL FOR REFORM 2–6 (2022) (describing the history of the Posse Comitatus Act).
[20] THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776); *see also* GOITEIN & NUNN, *supra* note 19, at 3.
[21] Maya Wiley, *How Trump Dangerously Turned An Old Law On Its Head—And What Congress Must Do About It*, THE NEW REPUBLIC (May 2, 2022), https://newrepublic.com/article/166263/trump-insurrection-act-lafayette-square-congress-fix.
[22] Rouland & Fearer, *supra* note 15.

I. The General Rule: The Posse Comitatus Constraint

The Constitution permits the federal government and the states to use the military domestically to enforce the law and stem internal violence. Insuring "domestic Tranquility" was, after all, a major goal animating the Constitution's creation.[23] The Calling Forth Clause empowers Congress "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions,"[24] while the Suspension Clause permits Congress to suspend habeus corpus when "in Cases of Rebellion or Invasion the public Safety may require it."[25] The states may even "engage in War" when "actually invaded or in such imminent Danger as will not admit of delay."[26] Moreover, under Article IV, the United States must "protect" each state "against domestic Violence" when that state's government demands assistance.[27]

Although the Constitution empowers the President to lead the military, it also empowers Congress to regulate the military's use. Certainly, the President exercises the "executive Power"[28] and serves as the "Commander in Chief of the Army and Navy of the United States, and of the Militia."[29] Moreover, the President possesses the duty to "take Care that the Laws be faithfully executed."[30] However, Article I gives Congress tools to limit this authority, granting Congress the power to "raise and support Armies"[31] and "make Rules for the Government and Regulation of the land and naval Forces."[32] Congressional power only increases during domestic deployments. Although some scholars suggest that the Calling Forth Clause merely permits

[23] *See* U.S. CONST. pmbl. (describing the reasons why delegates created a new Constitution).
[24] *Id.* art. I, § 8, cl. 15.
[25] *Id.* art. I, § 9, cl. 2.
[26] *Id.* art. I, § 10, cl. 3.
[27] *Id.* art. IV, § 4.
[28] *Id.* art. II, § 1, cl. 1.
[29] *Id.* art. II, § 2, c1. 1.
[30] *Id.* art II, § 3.
[31] *Id.* art. I, § 8, cl. 12.
[32] *Id.* art. I, § 8, cl. 14.

Congress to regulate the militia's use, others argue that, when Congress places guardrails on the domestic deployment of federal troops, that clause "resolves in Congress's favor any argument that such statutory limitations unconstitutionally infringe upon the President's constitutional authority as commander in chief."[33]

Congress has exercised this prerogative, creating a statutory framework limiting the President's authority to use the military to enforce the law domestically. The general rule, the Posse Comitatus Act, is that no one may use military forces under federal control to enforce civilian law.[34] The Posse Comitatus Act criminalizes using the armed forces to enforce the law unless the Constitution or another law authorizes their use, commanding that:

> "Whoever, *except in cases and under circumstances expressly authorized by the Constitution or Act of Congress*, willfully uses any part of the Army, the Navy, the Marine Corps, the Air Force, or the Space Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both."[35]

Note that the Coast Guard, due to its unique law enforcement role, is excepted.[36] Although the Posse Comitatus Act is a criminal provision, found within U.S. Code Title 18 alongside most major federal crimes, no prosecutions have ever relied on the statute.[37] Instead, courts have used it as a "guidepost" to constrain executive power.[38] For example, the Eighth Circuit Court of

[33] Stephen I. Vladeck, *The Calling Forth Clause and the Domestic Commander in Chief*, 29 CARDOZO L. REV. 1091, 1094–95 (2008).
[34] 18 U.S.C. § 1385.
[35] *Id.* (emphasis added).
[36] *See id.* (mentioning all other branches of the armed forces but omitting the Coast Guard); *see also* 6 U.S.C. § 468 (describing the Coast Guard's statutory mission, including domestic law enforcement).
[37] *Reference Sheet on the Insurrection Act and Related Authorities*, BROOKINGS INSTITUTION, https://www.brookings.edu/wp-content/uploads/2020/12/ReferenceSheet_InsurrectionActAndRelatedAuthorities.pdf (last accessed May 30, 2023).
[38] Bissonnette v. Haig, 776 F.2d 1384, 1388 (8th Cir. 1985).

Appeals has held that violating the Posse Comitatus Act renders a search or seizure "constitutionally 'unreasonable.'"[39] Despite the Posse Comitatus Act's bigoted origins (it was created to stop federal troops from enforcing voting rights during Reconstruction),[40] Congress has found that it "has served the Nation well in limiting the use of the Armed Forces to enforce the law."[41]

The Posse Comitatus Act does not bar military assistance to law enforcement completely. Rather, the Act only bars assistance involving military personnel that constrains citizens through military power. To constitute a Posse Comitatus violation, military "personnel" must have "subjected the citizens to the exercise of military power which was regulatory, proscriptive, or compulsory in nature, either presently or proscriptively."[42] A "mere threat" does not rise to the level of a violation.[43] Thus, while sharing tools, conducting surveillance, and counselling civilian law enforcement may not violate the Act, "maintained roadblocks" or "armed patrols" will.[44] Yet, when a United States Army Colonel advised federal law enforcement during a standoff by advocating for stricter rules of engagement, urging negotiations, and managing logistics, he could have "appreciably affected" law enforcement operations and therefore may have violated the Act.[45]

Constitutional considerations further qualify the Posse Comitatus rule. Although the Constitution does "not expressly grant [the President] any independent authority to use the armed

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[39] *Id.* at 1389.
[40] Axel Melkonian, *The Posse Comitatus Act: Its Reconstruction Era Roots and Link to Modern Racism*, SYDNEY U. L. SOC'Y (Sept. 2, 2020), https://www.suls.org.au/citations-blog/2020/8/28/the-posse-comitatus-act-its-reconstruction-era-roots-and-link-to-modern-racism.
[41] 6 U.S.C. § 466(a)(3).
[42] Bissonnette v. Haig, 776 F.2d 1384, 1390 (8th Cir. 1985). This test "is based on" language drawn from the Supreme Court's decision in *Laird v. Tatum*, 408 U.S. 1, 9–11 (1972). *Bissonnette*, 776 F.2d at 1390.
[43] *Bissonnette*, 776 F.2d at 1390.
[44] *Id.*
[45] United States v. Jaramillo, 380 F. Supp. 1375, 1377–1381 (D. Neb. 1974). The District Court did not determine whether these acts did, in fact, violate the Posse Comitatus Act. *Id.* at 1380–81.

forces at home,"[46] the Supreme Court has determined that the President does possess some inherent constitutional powers to deploy the military. Indeed, in President Eisenhower's declaration ordering federal troops to Little Rock, he cited to his inherent powers to use troops before citing to the Insurrection Act's statutory grant of authority.[47] Foremost, the Supreme Court has held that the President has both the inherent power and duty to defend the country when attacked.[48] Additionally, while striking down the use of martial law in Indiana during the Civil War, the Supreme Court noted that narrow uses of martial law may be allowed during unrest if, due to violence, the "courts are actually closed, and it is impossible to administer criminal justice according to law."[49] However, martial law may only extend to "the theatre of active military operations."[50] Even Congress agrees that:

> "the Posse Comitatus Act is not a complete barrier to the use of the Armed Forces for a range of domestic purposes, including law enforcement functions, when the use of the Armed Forces . . . is required to fulfill the President's obligations under the Constitution to respond promptly in time of war, insurrection, or other serious emergency."[51]

II. The Insurrection Act: An Exception to Normal Practice

The Insurrection Act, Chapter 13 of United States Code Title 10, is one such "circumstance expressly authorized by . . . Act of Congress" allowing the President to use the military to enforce the law domestically.[52] The Insurrection Act contains three different provisions permitting domestic military deployments in overlapping circumstances.

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[46] GOITEIN & NUNN, *supra* note 19, at 6.
[47] Exec. Order No. 10730, 22 Fed. Reg. 7628 (Sept. 24, 1957).
[48] The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 668 (1862).
[49] *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2, 127 (1866).
[50] *Id.*
[51] 6 U.S.C. § 466(a)(5).
[52] 18 U.S.C. § 1385; 10 U.S.C. §§ 251–255.

Section 251, entitled "Federal aid for State governments," permits the President to assist a state government under assault, echoing how Constitution Article IV allows the federal government to protect the states against internal violence when they request aid.[53] This section is the least discretionary, only granting power to the President in situations when "there is an insurrection in any State against its government" and after either the "legislature" or "governor" of the impacted state requests aid.[54] When these conditions are both satisfied, the President can federalize "militia," but only in the amount the distressed state requests, and mobilize federal "armed forces" in his discretion.[55] He must use these forces "to suppress the insurrection."[56]

Section 252 provides the President broader, more discretionary powers "to enforce Federal authority," requiring no state government permission to use force.[57] The President must determine two conditions to exist before using the military under this section. First, the President must determine that there exists either "*unlawful* obstructions, combinations, or assemblages" or a "rebellion against the authority of the United States."[58] The plain meaning of unlawful need not incorporate violence or danger; a peaceful assembly could perhaps be unlawful without a valid permit. Second, the President must determine that the unlawful obstruction or rebellion has made it "*impracticable* to enforce the laws of the United States . . . by the *ordinary course* of judicial proceedings."[59] The plain meaning of impracticable implies a more subjective, less onerous

[53] *Compare* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.") *with* 10 U.S.C. § 251 ("Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.").
[54] 10 U.S.C. § 251.
[55] *Id.*
[56] *Id.*
[57] *See* 10 U.S.C. § 252 (omitting any requirement to obtain another institution's permission prior to invocation).
[58] *Id.* (emphasis added).
[59] *Id.* (emphasis added).

burden than impossibility.[60] Additionally, requiring only that the unlawful acts obstruct government's "ordinary course" does not require the President to take additional efforts to enforce the law before using military force. Once the President has determined that these two conditions exist, he may then use any "militia" or "armed forces" that "he considers necessary" to confront the situation, again a discretionary choice.[61]

Section 253 also provides the President broad powers to stop "interference with State and Federal law" by an "insurrection, domestic violence, unlawful combination, or conspiracy." Yet, unlike § 251 and §252, which are both grants of power using the word "may," § 253 directs that the President "shall" take measures by "using the militia or armed forces" or "any other means." Like both preceding sections, § 253 leaves the choice of which forces to use in the President's hands, "as he considers necessary." The President may use military forces under this section in two different situations.[62] First, the President can invoke the section when an insurrection "hinders the execution" of state and federal law, thereby denying citizens a constitutional "right, privilege, immunity, or protection."[63] The local government must also have been "unable, fail[ed], or refuse[d]" to resolve the situation.[64] Second, the President may also invoke § 253 when an insurrection either "opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws."[65]

The two remaining sections of Chapter 13, § 254 and § 255, grant no powers. Instead, § 254 constrains presidential power by requiring that, whenever the President invokes §§ 251, 252,

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[60] *Compare Impossibility*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A fact or circumstance that cannot occur, exist, or be done.") *with Impracticability*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("For performance to be truly impracticable, the duty must become much more difficult or much more expensive to perform, and this difficulty or expense must have been unanticipated.").
[61] 10 U.S.C. § 252.
[62] 10 U.S.C. § 253.
[63] *Id.*
[64] *Id.*
[65] *Id.*

or 253, he must "immediately" issue a proclamation ordering "the insurgents to disperse and retire peaceably to their abodes within a limited time." This is not an insignificant limitation, for it means the President must give prior, public notice of his intention to use the military and cannot use the military covertly under these authorities. Section 255 is merely definitional, including Guam and the Virgin Islands within the Insurrection Act's scope.

Through the Insurrection Act, Congress grants a high degree of discretion to the President; courts have played little role in reviewing Presidential actions taken under the Act. The Supreme Court, interpreting an earlier, 1795 version of the Act, determined that discretion under the Act "is exclusively vested in the President, and his decision is conclusive upon all other persons."[66] That version employed language broadly similar to the Act's current text, declaring that "it shall be lawful for the President of the United States to call forth such number of the militia . . . *as he may judge necessary* to repel such invasion."[67] The Court found that "[w]henever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts."[68]

In reaching this holding, the Court also relied on the President's role as "commander in chief" with the duty to "take care" of the law's execution, asserting that "[h]e is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts."[69] When confronted with the enormous power this holding

[66] Martin v. Mott, 25 U.S. (12 Wheat.) 19, 28 (1827).
[67] *Id.* at 29 (emphasis added).
[68] *Id.* at 31–32.
[69] *Id.* at 31.

granted, the Court responded that it is "no answer that such a power may be abused, for there is no power which is not susceptible of abuse."[70]

However, a later Supreme Court case may have qualified presidential discretion to good faith invocations of the Act. Although the case involved the Governor of Texas, the Court analogized the Governor to the President when reaching its conclusions.[71] The Court admitted that, when an executive deploys the militia, "there is a permitted range of *honest* judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order."[72] When executive decisions are "conceived in *good faith*, in the face of the emergency, and directly related to the quelling of the disorder or the prevention of its continuance," those decisions are within the executive's discretion.[73] However, this argument should not be carried to its extreme, for those acts "unjustified by the exigency or subversive of private right and the jurisdiction of the courts" become "mere executive fiat," and are not within the executive's powers.[74] To stop such overreach, "the allowable limits of military discretion" and whether those limits have been "overstepped" still remain "judicial questions."[75]

The Insurrection Act's invocation may unlock extraordinary constitutional penalties punishing "insurrection or rebellion" against the United States.[76] The Fourteenth Amendment includes a provision barring anyone who has ever sworn to support the Constitution and subsequently "engaged in insurrection or rebellion against the [the United States], or given aid or comfort to the enemies," from holding state or federal office.[77] Yet, that Amendment does not

[70] *Id.* at 32.
[71] Sterling v. Constantin, 287 U.S. 378, 399 (1932).
[72] *Id.* (emphasis added).
[73] *Id.* at 400 (emphasis added).
[74] *Id.*
[75] *Id.* at 400–401.
[76] U.S. CONST. amend. XIV, § 3; JENNIFER ELSEA, CONG. RES. SERV., LSB10569, THE INSURRECTION BAR TO OFFICE: SECTION 3 OF THE FOURTEENTH AMENDMENT 3 (2022).
[77] U.S. CONST. amend. XIV, § 3.

define these disqualifying terms. Under one view, since the Calling Forth Clause grants Congress the power to regulate when forces may be mobilized and deployed to "suppress Insurrection,"[78] and Congress exercises this power through the Insurrection Act, the Insurrection Act's invocation defines when an "insurrection or rebellion" occurs.[79] If correct, a discretionary presidential choice would shape a constitutional punishment's scope.

My paper then discusses the different authorizing statutes under which the National Guard operates and how these authorities interact with the Posse Comitatus Act, as well as other statutory exceptions to the Posse Comitatus constraint. Later, my paper continues by analyzing past Insurrection Act invocations and proposed invocations. Drawing from these examples, I propose new guardrails for the Insurrection Act designed to stop two categories of abuse I identify: bad faith invocations and disproportionate invocations.

[78] *Id.* art. I, § 8, cl. 15.
[79] ELSEA, *supra* note 76, at 3.

Applicant Details

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Date of JD/LLB	**May 19, 2022**
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Law Review/Journal	**Yes**
Journal(s)	**American Criminal Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**District of Columbia**

Prior Judicial Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 12, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby St.
Norfolk, VA 23510

Dear Judge Walker,

I am a first-year associate at Cleary Gottlieb Steen & Hamilton LLP and a graduate of Georgetown University Law Center. I am writing to apply for a 2024-2025 term clerkship in your chambers. I am originally from Silver Spring, Maryland, and am particularly interested in clerking for a judge who is close to my family and hometown.

I have enclosed my resume, writing sample, and unofficial law school transcript for your review. Three professional references are attached to this letter.

Letters of recommendation are also attached from the following:

Professor Maria Glover
Georgetown University Law Center
jmg338@georgetown.edu

Professor Daniel Ernst
Georgetown University Law Center
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Professor Howard Shelanski
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Please let me know if I can provide any additional information. I can be reached at 301-938-5087 and tsalemmackall@gmail.com. Thank you very much for your consideration.

Respectfully,

Theodore Salem-Mackall

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EDUCATION

Georgetown University Law Center — **Washington, DC**
Juris Doctor, *cum laude* — May 2022
GPA: 3.82; Dean's List: Fall 2020/Spring 2021/Fall 2022/Spring 2022
Journal: *American Criminal Law Review* Executive Board; Managing Editor of the "Annual Survey of White Collar Crime" (2021-22)
Publications: *"Hugo Will Pull My Hair Out": Justice Black and Mandatory Arbitration on the Warren Court*, 48 Journal of Supreme Court History 54 (2023)
Federal Criminal Prosecutions of Labor Market Restrictions: Small Cases with Big Implications, 58 Am. Crim. L. Rev. Online 101 (2021)
"The Heart of the Business": Analysis of the Antitrust Division's New Policy of Crediting Corporate Compliance at the Charging Stage, 58 Am. Crim. L. Rev. Online 27 (2021)
Pro Bono: Rising for Justice Clinic, Tenant Justice Program (January 2022-May 2022)
Home Court Fellow, Washington Legal Clinic for the Homeless (February 2020-May 2020)

Colgate University — **Hamilton, NY**
Bachelor of Arts, *magna cum laude*, in English — May 2016
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Honors: Honors in English
Thesis: *As American as it Gets* (family history/personal memoir)

EXPERIENCE

Cleary Gottlieb Steen & Hamilton LLP, Washington, DC
Associate, October 2022-Present
Performed document review and generated substantial document chronologies in proceedings before the SEC and FINRA. Generated first drafts of filings later used in antitrust and § 1983 litigation. Performed oral argument in federal court in relation to a discovery dispute.

Georgetown University Law Center, (Remote) Washington, DC
Research Assistant to Prof. Maria Glover, June 2021-February 2022
Performed research and substantive drafting for Professor Glover's landmark paper *Mass Arbitration*. Generated audit trails, academic research reports and charts of arbitral claims for the article.

Cleary Gottlieb Steen & Hamilton LLP, (Remote) Washington, DC
Summer Associate, May 2021-July 2021
Performed legal research for antitrust matters and generated legal memos for the Structured Finance group.

U.S. Securities and Exchange Commission, Division of Enforcement, (Remote) Washington, DC
Enforcement Intern, May 2020-July 2020
Examined documents for potentially fraudulent trading activity and drafted deposition outline.

U.S. Department of Justice, Antitrust Division, Washington, DC
Paralegal Specialist, June 2016-February 2019
Reviewed substantial document productions, crafted substantive memoranda, and managed a team of paralegals as the lead paralegal in federal antitrust litigation brought by the Division.

PERSONAL INTERESTS

Songwriting (playing acoustic guitar / banjo), cooking, training in Mixed Martial Arts.

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Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	002	93	Bargain, Exchange, and Liability David Super	6.00	A-	22.02	
LAWJ	005	33	Legal Practice: Writing and Analysis Sonya Bonneau	2.00	IP	0.00	
LAWJ	007	93	Property in Time Sherally Munshi	4.00	B	12.00	
LAWJ	009	33	Legal Justice Seminar Lisa Heinzerling	3.00	A-	11.01	

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	45.03	3.46
Cumulative	13.00	13.00	45.03	3.46

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2020							
LAWJ	001	93	Legal Process and Society Lawrence Solum	5.00	P	0.00	
LAWJ	003	93	Democracy and Coercion Allegra McLeod	4.00	P	0.00	
LAWJ	005	33	Legal Practice: Writing and Analysis Sonya Bonneau	4.00	P	0.00	
LAWJ	008	32	Government Processes Howard Shelanski	4.00	P	0.00	

Mandatory P/F for Spring 2020 due to COVID19

	EHrs	QHrs	QPts	GPA
Current	17.00	0.00	0.00	0.00
Annual	28.00	13.00	45.03	3.46
Cumulative	30.00	13.00	45.03	3.46

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	015	05	American Legal History Daniel Ernst	3.00	A+	12.99	
LAWJ	038	07	Antitrust Law Howard Shelanski	3.00	A	12.00	
LAWJ	121	09	Corporations Donald Langevoort	4.00	A	16.00	
LAWJ	165	07	Evidence Gerald Fisher	4.00	A	16.00	

Dean's List Fall 2020

	EHrs	QHrs	QPts	GPA
Current	14.00	14.00	56.99	4.07
Cumulative	44.00	27.00	102.02	3.78

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Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	1098	05	Complex Litigation Maria Glover	4.00	A	16.00	
LAWJ	1528	09	Advanced Antitrust Seminar: Antitrust and Intellectual Property Mark Popofsky	3.00	A	12.00	
LAWJ	1604	05	Affordable Housing Seminar Michael Diamond	3.00	A-	11.01	
LAWJ	396	09	Securities Regulation Chris Brummer	3.00	A-	11.01	

Dean's List Spring 2021

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	50.02	3.85
Annual	27.00	27.00	107.01	3.96
Cumulative	57.00	40.00	152.04	3.80

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	1647	05	Warren Court Legal History Seminar Brad Snyder	3.00	A-	11.01	
LAWJ	178	07	Federal Courts and the Federal System Michael Raab	3.00	A-	11.01	
LAWJ	215	01	Constitutional Law II: Individual Rights and Liberties Jeffrey Shulman	4.00	A-	14.68	
LAWJ	304	05	Legislation Anita Krishnakumar	3.00	A	12.00	

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	48.70	3.75
Cumulative	70.00	53.00	200.74	3.79

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	1179	05	Modern Litigation Theory and Practice Seminar Maria Glover	3.00	A	12.00	
LAWJ	361	03	Professional Responsibility Michael Rosenthal	2.00	A-	7.34	
LAWJ	552	05	Housing Advocacy Litigation Clinic at Rising for Justice, Law Students in Court Division Paul diBlasi		NG		
LAWJ	552	80	~Seminar Paul diBlasi	2.00	A-	7.34	
LAWJ	552	81	~Casework Paul diBlasi	3.00	A	12.00	
LAWJ	552	82	~Professionalism Paul diBlasi	2.00	A-	7.34	
LAWJ	626	05	New Deal Legal History Seminar Daniel Ernst	3.00	A+	12.99	

Dean's List 2021-2022

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This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Theodore J. Salem-Mackall
GUID: 835463932

---------- **Transcript Totals** ----------

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	59.01	3.93
Annual	28.00	28.00	107.71	3.85
Cumulative	85.00	68.00	259.75	3.82

---------- **End of Juris Doctor Record** ----------

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 2021

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing in support of Theodore Salem-Mackall's application for a clerkship in your chambers. Theodore is a rising 3L at Georgetown Law, where he was a student this past year in my antitrust law class. Over the course of the semester—an unusual one because of the requirement that classes occur remotely via video—I came to know Theodore quite well. He is tremendously smart, hardworking, and has a sharp eye for incisive questions. I am confident he would be an excellent law clerk.

The class in which I taught Theodore had nearly 100 students. Even in that large setting, Theodore stood out for his ability to identify the key issues in the cases we studied and intelligently discuss the analytical and doctrinal complexities that these cases usually involved. For example, Theodore's grasp of the subtleties and contradictions of rule-of-reason analysis in certain horizontal restraint classes was especially nuanced, and his clear responses to hard questions I asked during class were of great benefit to his classmates. Theodore was able to synthesize the different strands of antitrust law we studied into a coherent framework that made his a leader in our class discussions. I was very grateful to have him in class, particularly given the potentially awkward on-line format.

On several occasions I met with Theodore in office hours, during which we discussed not only antitrust law, but Theodore's broader interest in law and policy. He struck me as a thoughtful, mature, and very sharp student but, more than that, as someone with a genuine interest in a range of legal issues. I had the opportunity to discuss with Theodore some article ideas he was considering. His resulting piece on how the Department of Justice is considering corporate compliance program when making criminal antitrust charges was a sharp and well-written contribution. Based on my experience in class and reading his work, I have little doubt Theodore would make both an excellent law clerk and a good colleague in chambers.

Please do not hesitate to contact me if additional discussion would be helpful.

Sincerely,

Howard Shelanski
Professor of Law
hshelanski@georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in support of Theodore Salem-Mackall's application for a clerkship in your chambers. I know Mr. Salem-Mackall principally from two courses: (1) a twenty-five-student course in American Legal History in the Fall 2020 semester; and (2) a smaller seminar on the legal history of the New Deal in the Spring 2022 semester. I feel I know him well from our conversations in class, during office hours, and at his graduation. We have since exchanged emails and spoken about his interest in pursuing a clerkship.

American Legal History is a lecture and discussion course on the political history of legal institutions in the United States during the twentieth century, with an emphasis on administrative law, presidential power, and the legal profession. Its central argument is that the legal profession played a central law in subjecting administrative agencies and presidential acts to a particular version of the rule of law, which looked to court-like procedures, if not courts themselves, to keep official discretion in check. The exam, which was the sole basis for Mr. Salem-Mackall's grade, presented him with essays on two topics we did not cover in class but which underwent historical change much like those we did. It was the historical equivalent of an "issue-spotting" exam in a doctrinal law course.

The essays in Mr. Salem-Mackall's exam were on the law and politics of public health administration and on a Black female lawyer named Eunice H. Carter. He handled them beautifully. He aptly compared battles within the Department of the Treasury, where the Public Health Service was housed, over a plague outbreak in 1900, with roughly contemporaneous conflict over immigration within the Department of Commerce and Labor. He also was extremely good on the abandonment of *de novo* judicial review of health officials' fact finding with analogous developments the rate-setting of public utility commissions. In his answer to the second, biographical essay, he drew upon a remarkable range of materials with great specificity and aptness to compare Carter with other Black and other female lawyers. I don't believe I've ever given any exam a higher raw score in my many years teaching the course.

Even more impressive was Mr. Salem-Mackall's paper on *United States v. Socony-Vacuum* (U.S. 1940) in my seminar on the New Deal. Others have written about this judicial landmark, which established that price-fixing is illegal per se under the Sherman Act, but no one has so thoroughly researched it from its origins in the petroleum policy of the early New Deal through its disposition by the Supreme Court in a very different political climate. Mr. Salem-Mackall fully took advantage of the unusual opportunity Georgetown law students have, thanks to their proximity to the Library of Congress and the National Archives, to work in the manuscript collections of prominent lawyers and judges and federal agencies. He put in many hours in the papers of William Douglas, Robert Jackson, Stanley Reed, and the Department of Justice, as well as, on-line, those of Thurman Arnold, who was in charge of the appellate phase of the case. His final paper clearly presented the result of this research in great detail. I particularly liked its rendering of the tension between the seasoned local litigator who tried the case in Madison, Wisconsin, and the young New Deal lawyers in DOJ's Antitrust Division who not just a verdict but a precedent that remade the law. To make the paper publishable, Mr. Salem-Mackall still needs to center it more surely on a single argument, a task he has postponed while he revised a seminar paper on Justice Hugo Black and federal arbitration, which has just appeared in the *Journal of Supreme Court History*.

Yet in its present state, Mr. Salem-Mackall's research paper and his performance in his other course with me convincingly testify to his persistence, intelligence, attentiveness to detail, and imagination. In our conversations, I also found him to be interesting, thoughtful, and engaging. You get a sense of his range from his extracurricular activities as an undergraduate: He was a member of both a rugby team and an experimental theater troupe. His college thesis drew upon his experiences as the first legally adopted child by a same-sex couple in the state of Maryland. Perhaps that background accounts for his openness to those different from himself, which I observed in many classroom exchanges. I am confident he would be an exemplary clerk in your chambers, and I recommend him to you very highly.

Sincerely,

Daniel R. Ernst
Carmack Waterhouse Professor of Legal History

Daniel Ernst - ernst@georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing on behalf of Theodore Salem-Mackall, Georgetown University Law Center class of 2022, who has applied for a clerkship in your chambers. Theodore has an excellent record of success at Georgetown, as appears on his paper record. He was an excellent student in two of my classes, and as my research assistant, truly outstanding. Having worked very closely with him for two years, I can personally attest that he is intelligent, extremely hard-working, engaged, collaborative, and kind. He would make an excellent clerk, and I recommend him to you with great enthusiasm.

I first met Theodore as a student in my upper-level Complex Litigation course. This course is one of the hardest in the upper-level curriculum at Georgetown, and Theodore was not only up for the challenge, but he also earned an "A" on the final exam. Further, his participation in class reflected both thoughtfulness and preparation. Both in class and on the exam, his facility with and interest in civil litigation and high-level complex litigation shone through. Theodore displayed not only a firm grasp of the "black-letter" concepts, he identified and understood the various interconnections between civil litigation and redress, legal rights, and the overall regulatory apparatus in the United States.

Theodore built on his sophisticated understanding and knowledge of complex litigation in my upper-level Modern Litigation Theory and Practice Seminar. This course is writing intensive, requiring 4-5 page papers each week, and it is pitched at a very high level. It attracts top students eager to engage with difficult materials that range from economic and behavioral economic theories of law and litigation; various models of litigation and settlement (e.g., psychological, finance and options-based, access-to-justice, regulatory); settlement theory and dynamics (including mass settlement and contractual closure); third-party litigation funding models and development; contractual mandatory arbitration; and the potential rise of bankruptcy for mass disputes. Students come out of this course extremely prepared to navigate the most difficult and current issues in litigation in a sophisticated way.

A few of my seminar students have, over the years, taken their learning in my seminar even further and produced a longer, publishable-quality paper. In Theodore's case, he built on themes and concepts he had explored and asked about during the seminar and initiated his own deep dive into the history of mandatory arbitration and its reception in the Supreme Court. In so doing, he unearthed the fascinating and overlooked jurisprudence of Justice Hugo Black, who dissented in six separate decisions in which the Supreme Court enforced a mandatory arbitration agreement. Theodore then derived from these dissents a Federal Arbitration Act jurisprudence not just particular to Black himself, but one that provides somewhat of a rejoinder to—or at least a different account of—the conventional historical narrative that situates the Supreme Court's departure from early Federal Arbitration Act jurisprudence as having occurred largely post-1980. This piece clearly demonstrates Theodore's interest in and commitment to the study of law as well as his work ethic. More than this, though, it makes a novel contribution to the scholarship and study of mandatory arbitration and the Federal Arbitration Act.

Theodore's performance as a student led me to ask him to be a research assistant for the summer of 2021 and the 2021-22 academic year. This time period was one of the most intensive for my recently published study on Mass Arbitration in the *Stanford Law Review*. This Article developed the first and comprehensive case study of mass arbitration and provided a taxonomy of the results. Among other things, developing the study required countless hours of research into a complex web of ever-changing (and often hidden) arbitration agreements used by a number of corporations. Moreover, it required finding, navigating, and making sense of a labyrinth of (often incomplete) arbitral records, court filings, and motions back and forth between courts and arbitral fora. Theodore worked tirelessly to help me build the massive case dataset and to make coherent sense of its vast components. His assistance was truly integral to the production of this study, which has since garnered a number of awards, including most recently the Award for Best Paper of 2022 by the Berkeley Law Civil Justice Research Initiative and the Law and Society Association. Given this, I have no doubt that Theodore is more than up to the task of performing the extensive and difficult work involved in mastering the records and materials of the most complicated of cases.

Finally, Theodore is not just a strong student, writer, and researcher. He is also friendly and collaborative. Based on many interactions with Theodore, I am confident that he has the skills, work ethic, and care required for success in a clerkship. I urge you to give his application the most careful consideration. If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

J. Maria Glover
Professor of Law

Maria Glover - jmg338@law.georgetown.edu - 202-662-4029

Writing Sample

Theodore Salem-Mackall

The below paper was prepared in my "Warren Court Legal History Seminar" class at Georgetown University Law Center in the Fall of 2021. It examines Justice Hugo Black's position on the Federal Arbitration Act, and the Warren Court's evolving view towards mandatory arbitration during the 1950s and 60s. It draws on my original research into the justices' personal papers. In June 2023, an edited version of this piece was published in the *Journal of Supreme Court History*.

Although I received feedback from Professor Brad Snyder in preparing this draft, it is entirely my own work. Given the paper's length, I would direct any reader who does not wish to review the full piece to Sections I-IV (p. 1-15). These selected pages effectively display my research and writing skills, as well as the piece's overall thesis. Please also note that pages 22-30 are endnotes.

"Hugo Will Pull My Hair Out"
A History of Hugo Black and Mandatory Arbitration on the Warren Court

Theodore Salem-Mackall

I. Introduction – The Former Alabama Senator

Hugo LaFayette Black was among the Supreme Court's foremost critics of mandatory arbitration. From 1961-67, Black dissented in six cases enforcing a mandatory arbitration clause contained in a contract or collective bargaining agreement.[i] His dissents consistently argued that broad grants of arbitration often came at the expense of a party's constitutional right to a fair "day in court."[ii] The early Warren Court shared Black's concerns. In 1953, the Court held in *Wilko v. Swan* that the right to bring Securities Act claims in federal court could not be waived through a form contract containing an arbitration agreement.[iii] Yet their hostility would not last. In 1967, a very different Warren Court decided *Prima Paint v. Flood & Conklin*.[iv] *Prima* established that the Federal Arbitration Act, passed in 1925 to make arbitration agreements "valid, irrevocable and enforceable" in federal court,[v] was substantive law and could supersede state arbitration rules in diversity cases.[vi] The decision also made arbitration clauses "severable" from the rest of contracts, allowing arbitrators to review "fraud in inducement" defenses to breach claims rather than courts.[vii] *Prima* would be the first in a long line of Supreme Court cases that gradually established modern "liberal enforcement" of contractual arbitration clauses.[viii] Hugo Black opposed every aspect of *Prima*. In a dissent longer than the opinion, he described it as a "statutory mutilation" which unacceptably delegated legal defenses to biased arbitrators.[ix]

Black's arbitration opposition stemmed from his time in the legislature, where he witnessed how special interests influenced the passage of statutes like the Federal Arbitration Act. During Black's 12 years in the Senate, he saw "high-powered, deceptive, telegram-fixing, letter-framing, Washington-visiting [lobbyists]"[x] defeat his attempts to provide municipal power to impoverished

Alabama towns,[xi] and push for endless exemptions to his Black-Connery bill, which became the basis for the Fair Labor Standards Act.[xii] For Black, experiences like these displayed how special interests could manipulate politics to entrench their own power.[xiii] Black's belief in this dynamic contributed to his skepticism of the FAA. Passed just one year before his arrival in the Senate, the FAA addressed American courts' then refusal to enforce contractual agreements to arbitrate.[xiv] Early common-law courts believed that parties could not "oust" the court of its jurisdiction through private agreement.[xv] The FAA ended this "ouster doctrine" by making arbitration clauses "as enforceable as other contracts – no more no less."[xvi] Many of the bill's congressional advocates intended for the law to have a narrow scope.[xvii] Yet Black knew its effect could expand past their intent. The FAA emerged at the tail end of a long pro-arbitration lobbying campaign drawing its "principal support from trade associations…[and] commercial and mercantile groups in the major trading centers."[xviii] To Black, the support of these groups–the same ones who opposed his New Deal reforms–indicated that the statute principally benefited entities with enough bargaining power to use arbitration clauses to preclude legal claims.[xix] For a former Birmingham trial lawyer who believed in the value of juries',[xx] it would be unconscionable to apply the statute in a way that waived an individual's right to their "day in Court" by the stroke of a pen. Yet, despite Black's best efforts, the Warren Court effectively allowed this to occur in *Prima Paint*.

II. Roadmap

This paper establishes Hugo Black as one of the Supreme Court's foremost critics of mandatory arbitration. It also, for the first time in the literature, examines historical materials related to the Warren Court's arbitration jurisprudence, tracing how the Court moved from support of Black's arbitration views in the early 1950s to a break with them by the late 1960s. First, it displays how the Warren Court shared Black's arbitration skepticism in 1953's *Wilko v. Swan*,[xxi]

even as Black pushed the Justices to express more disapproval of the practice. Next, it shows how the Court moved away from Black in 1963's *Moseley v. Electronic & Missile*,[xxii] where it declined to rule on whether claims brought under the Miller Act could be arbitrated. A Court with different personnel, and stated policies in favor of employer-union arbitration, displayed far less reticence about statutory claim arbitration than the 1953 Court did. Yet *Moseley* also saw the Justices hesitate, shirking back from allowing full arbitration of Miller Act claims, or arbitral review of fraud in inducement defenses to contract formation, in part due to heavy lobbying by Black. Then, the paper reviews 1967's *Prima Paint v Flood & Conklin*,[xxiii] its status as a proxy battle for the Second Circuit case *Robert Lawrence Co. v. Devonshire Fabrics*,[xxiv] and how Black attempted to refute both cases in his venomous dissent.[xxv] *Prima* saw Black's arbitration views get firmly rebuked by a majority looking to leave behind the Court's previous hostility to the practice. The paper concludes by reviewing how Black's arbitration views can be seen as one part of a larger theme in his jurisprudence: strong defenses of the constitutional right to a fair "day in Court" from powerful forces which could abrogate it.

III. *Wilko v. Swan* – "I Certainly Have Plenty of Biases"

The early Warren Court shared Black's antagonism towards mandatory arbitration in 1953's *Wilko v. Swan*. Anthony Wilko was induced by his stockbroker to buy 1600 shares of Air Associates common stock based on fraudulent assurances that they would increase in value.[xxvi] He resold two weeks later at a $3888 loss.[xxvii] Wilko sued the brokerage under § 12(2) of the 1933 Securities Act.[xxviii] The firm moved for a stay, asserting that their relationship was governed by contracts providing that any dispute would be determined through binding arbitration.[xxix] Judge Henry Goddard of the Southern District of New York denied their motion,[xxx] but a divided Second Circuit reversed, holding that parties could agree to arbitrate a dispute in advance in the same way

that parties could choose to settle.[xxxi] Judge Charles Clark argued in dissent that a binding arbitration clause in a stock purchase agreement implicitly waived § 22 of the Securities' Act's provision of a federal forum to securities buyers. This violated § 14 of the Act, which voided any waiver of compliance with its substantive requirements.[xxxii] Clark also argued that pre-dispute arbitration agreements contravened Securities Act policy by making purchaser's rights "capable of nullification by…fine-print restrictions of the broker's devising."[xxxiii]

The Court granted *certiorari* in *Wilko* on June 1, 1953.[xxxiv] The case held major implications for arbitration's future. The FAA prompted many lower courts to abandon their previous hostility to the practice.[xxxv] Arbitration clauses were becoming *de rigueur* in adhesion contracts; some 90% of stock brokerages required arbitration of customer-broker disputes by 1953.[xxxvi] Yet it remained on shaky legal ground. Some courts still refused to enforce arbitration agreements.[xxxvii] Questions remained about which statutory claims could be arbitrated.[xxxviii] Early Supreme Court cases interpreting the FAA only dealt with the Act in relation to maritime law and were inapposite on these issues.[xxxix] *Wilko* represented a turning point. A ruling in favor of arbitration could expand it to a wider range of claims and contracts. A decision against it could require "almost every [stockbroker] margin contract…to be rewritten."[xl]

Unfortunately, Anthony Wilko was not ready to litigate his important case. Wilko was broke; his counsel did not file a brief with the Second Circuit,[xli] and he proceeded *in forma pauperis* at the Supreme Court due to "losses sustained in [the] transaction."[xlii] So the S.E.C., wanting to ensure vigorous Securities Act enforcement, entered the fray. The agency filed an *amicus* brief[xliii] that Wilko's counsel deferred to,[xliv] participated in oral argument,[xlv] and made itself the dispute's "primary party."[xlvi] The agency's arguments echoed Judge Clark's dissent; pre-dispute agreements to arbitrate Securities Act § 12(2) claims were a void waiver of the statute's provision of a federal

venue,[xlvii] and arbitrating these claims frustrated purchasers' statutory rights because arbitrators would act "according to their business background" rather than in plaintiffs' interest.[xlviii] The broker's brief pointed to the lack of specific exemptions for Securities Act claims in the Federal Arbitration Act's text.[xlix]

Wilko receded into conference on December 9, 1953,[l] where Justice Hugo Black was among the first to speak.[li] Black stated that the case came down to a conflicting presumption between the Arbitration and Securities Acts. Yet here, the Securities Act won out. It guaranteed stock purchasers a federal forum, so they were not bound by pre-dispute arbitration agreements that foreclosed this right.[lii] He also expressed approval of Judge Clark's dissent, and its holding that arbitration of Securities Act claims could frustrate their enforcement.[liii] Yet Justice Stanley F. Reed pushed back, arguing that the Court could not hold that arbitration was unable to vindicate statutory rights.[liv] William O. Douglas, Harold H. Burton, and the newly appointed Chief Justice Earl Warren voted with Black to reverse, but the rest of the Court went with Reed.[lv] After conference, *Wilko* was a 5-4 vote in favor of pre-dispute arbitration of federal statutory claims. Justice Reed was assigned the majority opinion.[lvi]

Wilko almost vastly expanded the Federal Arbitration Act's reach in the 1950s, until Justice Reed underwent a change of heart. After a series of tortured drafts,[lvii] Reed wrote the Court on November 20 saying that "further consideration" of *Wilko* lead him to change his mind.[lviii] He circulated a new memo which later became the majority opinion.[lix] Reed's memo showed his vacillation, writing that "two [statutory] policies, not easily reconcilable, are involved in this case."[lx] Yet it ultimately endorsed Justice Black's position at conference: pre-dispute arbitration agreements waived purchasers' right to proceed in federal court in violation of § 14 of the

Securities Act, and Congress's goal of creating an efficient cause of action for defrauded purchasers was "better carried out" by making those agreements unenforceable.[lxi]

Reed's reversal made *Wilko* a defeat for arbitration, but a win for Hugo Black. Black approved of Reed's new draft, writing Reed two days after it circulated that he was "glad he came out that way."[lxii] However, Black also pushed Reed to make his draft even harsher on arbitration. Where Reed took pains to state "the Federal Arbitration Act establishes the desirability of arbitration as an alternative to the complications of litigation," Black noted that "arbitration can be just as complicated [as litigation]" and "its usefulness has been greatly exaggerated."[lxiii] Where Reed ended by "discounting...any bias that we as judges…have for the judicial process as against arbitration..." Black wrote "I certainly have plenty [of biases against it] insofar as a man's right to sue is to be governed by law rather than by contract where bargaining power of the parties' is essentially unequal."[lxiv]

Reed did not adopt Black's rhetoric, but his final opinion relayed Black's views on the case.[lxv] It also won a 6-2 majority, as Tom Clark switched his vote from conference,[lxvi] and Robert Jackson concurred in the judgement.[lxvii] Even the case's dissenters, Felix Frankfurter and Sherman Minton, admitted some questions about arbitration. While Frankfurter did not believe that Securities Act claimants would be unable to vindicate their rights in arbitration,[lxviii] he admitted that, if Wilko faced no choice but to assent to this clause, then it could be unconscionable.[lxix] The Court went from allowing Securities Act arbitration at conference to expressing unanimous skepticism about its use in this context. However, the Court's good days of agreement on arbitration[lxx] were coming to an end.

IV. *Moseley v. Electronic & Missile* – "No Room for Halfway Decisions"

After *Wilko*, the Warren Court next addressed the Federal Arbitration Act's application to a statutory claim in 1963's *Moseley v. Electronic & Missile*.[lxxi] *Moseley* involved a federal subcontractor who brought a damages claim against their general contractor under the Miller Act,[lxxii] which grants subcontractors that cause of action.[lxxiii] The prime contractor filed a motion to compel arbitration under their agreement's terms.[lxxiv] The Middle District of Georgia enjoined the arbitration because the subcontractor raised a colorable fraud in inducement defense which the federal court had to resolve.[lxxv] Judge Elbert Tuttle reversed for a divided Fifth Circuit, holding that the FAA "expressly and unequivocally" conferred a right to arbitrate disputes.[lxxvi] In addition, Judge Tuttle held that the arbitrator, rather than the federal court, could litigate the fraud in inducement defense.[lxxvii] In making this holding, the Fifth Circuit adopted the reasoning of a recent Second Circuit case called *Robert Lawrence v. Devonshire Fabrics*.[lxxviii] *Devonshire* saw Judge Harold Medina hold that the FAA was a substantive statute which precluded state arbitration law,[lxxix] and, where a plaintiff raised fraudulent inducement as a defense to a motion to compel arbitration, arbitrators' could review the fraud claim unless their defense centered *specifically* on the arbitration clause.[lxxx] *Devonshire* was a major step towards expanding the FAA.[lxxxi] Its importance was not lost on the Supreme Court, who granted a writ of *certiorari* to the case in 1960,[lxxxii] only to see it dismissed after a settlement.[lxxxiii]

The Court granted a writ of *certiorari* in *Moseley* on December 3, 1962.[lxxxiv] This grant followed a split 4-5 vote, with Byron White and Arthur Goldberg switching their initial votes[lxxxv] due to the "important question of the availability of commercial arbitration under the Miller Act."[lxxxvi] Only Earl Warren and Hugo Black voted to grant the writ the entire time.[lxxxvii] Black likely did so because *Moseley* represented another chance to preclude arbitration of federal statutory claims. Both sides in *Moseley* raised similar arguments to those from *Wilko*. Petitioner

argued that allowing Miller Act arbitration negated the statute's federal forum and impaired enforcement;[lxxxviii] respondent focused on the FAA's lack of specifically enumerated exceptions for Miller Act claims.[lxxxix] Yet *Moseley* also presented other issues which were not raised in *Wilko*. The case involved questions about whether interstate commerce was involved,[xc] the inherent unfairness of forcing a Georgia subcontractor to arbitrate their claim in New York,[xci] and the question of whether the fraud in inducement claim had to be litigated by the federal court, or if the arbitrator could resolve the issue.[xcii] On this issue, respondent's brief, just like the Fifth Circuit, approvingly cited *Devonshire*'s holding that "arbitration is not barred by an assertion that the entire contract was induced by fraud; there must be a specific claim that the arbitration provision itself was fraudulently procured."[xciii]

At oral argument, Hugo Black made clear that he believed all *Moseley*'s issues should be resolved one way: against arbitration. When respondents' counsel argued that the Miller Act was a "venues statute which could be waived," he asked sarcastically, "do you think [Congress] left [claims] to that [federal] forum without saying anything?"[xciv] Black also challenged respondents' argument that arbitration must take place in New York, stating that a ruling in their favor required the Court "to hold that 435 members of Congress…passed [the FAA] intending that [a] man in South Georgia could waive his right to have his case tried under the Miller Act in South Georgia, and must go all the way to New York or to London...Or to Switzerland...in order to try his case."[xcv] Black also implied that the subcontractor had the right to have the federal court, not the arbitrator, decide the fraud claim. As Black said, "the books are filled with cases that people have been defrauded by written contracts," and courts had a right to review them.[xcvi]

Black voted to reverse at *Moseley*'s April 19 conference, although his specific comments are not recorded.[xcvii] Earl Warren also voted to reverse, "[agreeing] with" Black that Miller Act claims

could not be arbitrated.[xcviii] However, their position found no other supporters. Byron White and Tom Clark only said that the case involved "interstate commerce" and so was covered by the FAA.[xcix] William J. Brennan and Arthur Goldberg made clear that the Miller Act did not preclude arbitration.[c] Justice John Marshall Harlan II even endorsed *Devonshire*.[ci] The entire Court, except for Black and Warren,[cii] held that Miller Act claims were arbitrable, and only modified the lower court's decision by holding that the arbitration should take place in Georgia rather than New York.[ciii] The arbitration hostility which the Warren Court exhibited in *Wilko* now seemed nonexistent, with little explanation as to why.

The Warren Court's shift on FAA arbitration in *Moseley* may have been influenced by its recent endorsement of arbitration between employers and labor unions. Labor arbitration developed separately from commercial arbitration,[civ] and was a widely-used "middle-class panacea" for labor conflict by the 1950s.[cv] The Court expressed approval of the practice in 1957's *Textile Workers Union v. Lincoln Mills*,[cvi] holding that § 301 of the Labor Management Relations Act generated a "congressional policy" in favor of labor arbitration.[cvii] It reaffirmed this support three years later in a trio of cases known as the "*Steelworkers* trilogy,[cviii] holding that *Wilko*'s "hostility" to arbitration arose where it was "the substitute for litigation."[cix] In the labor context, arbitration was "the substitute for industrial strife." Courts should encourage this more peaceful practice by resolving "doubts [as to enforceability] … in favor of coverage."[cx]

Hugo Black did not participate in the consideration or decision of *Lincoln Mills* or *Steelworkers*.[cxi] He never endorsed their reasoning, but also never expressed disapproval. He also voted to enforce some labor arbitration clauses in cases deferring to *Steelworkers*.[cxii] This was not surprising. Black was a workers' rights advocate dating back to the New Deal.[cxiii] In theory, labor arbitration served worker's interests by encouraging employers to enter collective bargaining

agreements. Yet Black's pro-labor sentiments did not prevent him from becoming the Warren Court's preeminent employer-union arbitration skeptic in the early 1960s. In case after case, Black accused the court of letting their "leanings to treat arbitration as an almost sure and certain solvent of all labor troubles" override other issues with granting enforcement."[cxiv] However, he almost always dissented alone.[cxv] This Warren Court, and its new appointee Arthur Goldberg in particular, favored unions,[cxvi] and the unions supported labor arbitration.[cxvii] The Justices were not going to endorse Black's stubborn opposition to labor's "new kingpin."[cxviii] Of course, until 1963, the Court's arbitration endorsement remained centered on the employer-union context. *Moseley*'s conference indicated how easy it might be to extend the Court's warm feelings on labor arbitration to arbitration of statutory claims.[cxix]

However, conference was not the end of deliberations in *Moseley*. Black soon began looking to exert influence with the other Justices. On April 22, three days after conference, Black sent a letter to the Court suggesting that a ruling in favor of the general contractor in *Moseley* would require them to overturn their precedent.[cxx] The next day, Black wrote a letter to Justice Arthur Goldberg.[cxxi] Hoping to "at least…get [Goldberg] to look closely at [*Moseley*]'s materials,"[cxxii] he played on the Justice's pro-labor sympathies. Black wrote Goldberg that "I read the legislative history of the [FAA] last night…[That] Act was drafted and promoted by merchants and was intended to meet their particular needs. The Arbitration Act could not have been passed but for assurances…that its arbitration system could not be applied to industrial workers and employment contracts…This is one of the many reasons why I said to you in re *Moseley* that there is no room for halfway decisions. Whether you are right or wrong in believing that arbitration of labor disputes is a highly desirable public policy, I am convinced by the history and language of the Arbitration Act that it would be a complete distortion…to hold that it applies to employment contracts..."[cxxiii]

Black would not stop there. On May 31, 1962, he circulated a massive memo to the Court explicitly outlining his views on arbitration, and arguing for a reversal in *Moseley*.[cxxiv] This memo included a range of arguments: allowing arbitration of Miller Act claims could increase public works' expenditures,[cxxv] the transaction did not involve "interstate commerce,"[cxxvi] and any arbitration which takes place should occur in Georgia, not New York.[cxxvii] Black also attacked the lower court's endorsement of *Devonshire*, and its holding that fraud in inducement claims could be decided by an arbitrator rather than a federal court.[cxxviii] *Moseley*'s subcontractor made colorable allegations of fraud. § 4 of the FAA stated that a court must be satisfied that the "*making* of the agreement for arbitration…is not in issue" in order to enforce an agreement.[cxxix] Black, ever the textualist, pointed out that a fraud in inducement claim necessarily puts the "making" of an agreement at issue. He also pointed to statements by FAA sponsors stating that courts must hear "all defenses, equitable and legal" which could exist before enforcing arbitration agreements; this would encompass fraud in inducement. [cxxx]

Black's memo primarily centered on two arguments that were central to his view of arbitration: a statutory grant of a federal forum could not be waived through pre-dispute contracts involving unequal bargaining power,[cxxxi] and allowing arbitration of statutory claims could frustrate their vindication.[cxxxii] Black supported his first claim by pointing out how *Moseley*'s federal contractor, who essentially possessed a monopsony after the contract was granted, imposed this venue waiver on a subcontractor without leverage. The court could not hold that the subcontractor truly assented to this dispute resolution method given how "theoretical equality of opportunity to bargain at arm's length is often a fiction in our world of commercial reality."[cxxxiii] Enforcing the waiver was even more objectionable in the context of the Miller Act, which was "meant to guard against the evils resulting from inequality of bargaining power" between these

parties.[cxxxiv] Black made his second argument, that arbitration of statutory claims impaired enforcement, by looking at the FAA's history. Drawing on his Senate experience, he pointed out that the statute "must be interpreted in light of the [large business interests] of the bill's supporters."[cxxxv] The FAA was drafted by, and principally benefited, large mercantile groups. Its enacting legislature intended for it to only apply to simple contractual disputes within that community.[cxxxvi] They certainly did not intend for it to apply to captive consumers, employees, or subcontractors.[cxxxvii] Here, perhaps understanding the gap between him and the rest of the Court on labor arbitration, Black also distinguished *Moseley* from that context; "it does not follow that because [labor] arbitration has value in such situations the [FAA] should be construed to cover any and all areas…heedless of the commands of other statutes designed to preserve the ancient, treasured right to judicial trials."[cxxxviii] Then, he again related this arbitration back to the corrupt intent of the FAA's drafters: "we should be especially careful not to apply the Arbitration Act sweepingly in view of the avowed purpose of its proponents to do away with the constitutional right to trial by jury."[cxxxix] Citing a statement by one of the bill's drafters, stating that one of the "evils" it was intended to address was the failure of non-expert juries to reach decisions "regarded as just…by the standards of the business world,"[cxl] Black warned that they should look carefully at a bill "intended to do away with what its supporters called an 'evil' but the Constitution calls a 'right.'"[cxli]

Black was moving mountains to make the Court see his view. At first, they appeared to be having none of it. Tom Clark's early drafts ignored most of Black's arguments.[cxlii] They rejected his view that the Miller Act's federal venue could not be waived. There was no enumerated arbitration exception in the Miller Act, and the FAA "deemed [arbitration] to be in furtherance of, rather than detrimental to, the public interest."[cxliii] Upon reading Clark's draft on June 3, Black

prepared to make his memo a dissent.[cxliv] Yet Black's memo may have slowly influenced the rest of the Court. Clark noted on one draft that "Black is the only one who would…reverse the Court of Appeals…the Justice and the others agree with the Arbitration point made by Black. But they think the DC could go on to decide the other points in the contract..."[cxlv] This indicates that Black's arbitration memo was getting some traction. Other justices were also taking issue with Clark's draft. Goldberg wrote him that "I am generally in agreement with…the result you have reached, but the route you have taken to get there…troubles me,"[cxlvi] while Douglas noted that they should perhaps remand to the District Court instead of the arbitrator.[cxlvii] Eventually, all these issues got to Tom Clark. On June 5th, Clark sent Douglas a short note written on a flashcard: "I have been talking to the brothers and they are convinced that we do not need to reach the arbitration issue. It was not an issue as to enforceability below as the respondent did not pray for anything other than a stay. I have therefore…eliminated this part of the opinion." Knowing how this would affect their anti-arbitration colleague, Clark added, "I suppose this will cause Hugo to pull my hair out but I believe that it is right."[cxlviii]

Moseley came down on July 11, 1962 as a very short opinion.[cxlix] It did not rule on the arbitrability of Miller Act claims, whether the case involved interstate commerce, or any of its other issues. It only remanded to the lower Court to determine the subcontractor's fraud in inducement defense.[cl] Black's vast memo was shaped down to a short concurrence joined only by Warren.[cli] The concurrence pointed out the questions which the opinion left open but approved of the decision to remand to the District Court. It also cast enmity towards *Devonshire*, and its allowance for arbitrators to review fraud in inducement claims; "fraud in the procurement of an arbitration contract makes it void and unenforceable and this question of fraud is a judicial one which must be decided by a court."[clii]

Moseley displayed that this Warren Court had very different arbitration views than the one which decided *Wilko*. Gone were Reed's reversals, Jackson's protection of judicial review for arbitral decisions, Burton's concerns about arbitrator bias,[cliii] or even Frankfurter's admission that some arbitration clauses could be unconscionable. In their place were justices with more positive views of the practice. William Brennan pushed for arbitration as a labor lawyer.[cliv] John Marshall Harlan II's endorsement of *Devonshire* in conference indicated that he was an advocate of it.[clv] Byron White went on to join FAA decisions which went farther than the Warren Court would.[clvi] Even Black's old allies appeared to be reversing their earlier positions. Tom Clark was always unpredictable.[clvii] William Douglas was strongly in favor of labor arbitration, having written the opinions in *Lincoln Mills*[clviii] and *Steelworkers*,[clix] and voted with the majority in *Moseley*. Even Earl Warren, who did vote with Black, tended to care more about getting the "right" result than following a consistent reasoning.[clx] However, *Moseley* probably did not make Black "pull out" anybody's hair. He may have just breathed a sigh of relief. The final opinion did not oppose Miller Act arbitrability, but it did not endorse it. The Court still remanded to the District Court, not the arbitrator, to determine the subcontractor's fraud defense.[clxi] This defeated any Supreme Court endorsement of *Devonshire*. Black could call this one a draw. Yet the war over *Devonshire* was not over.

V. *Prima Paint* – "Un-American Procedures"

In October 1964, Flood & Conklin Manufacturing Co. entered a "Consulting Agreement" with Prima Paint Corp. to facilitate Prima's purchase of F&C's paint business.[clxii] The agreement provided that F&C's chairman would furnish "consultation" in connection with the business transfer in exchange for a percentage of Prima's sales receipts. Their agreement included a broad arbitration clause.[clxiii] In early 1965, Prima Paint's first payment to F&C did not arrive when due.

Seventeen days later, Prima Paint notified F&C's attorneys that F&C breached their contract by fraudulently representing that they were solvent when they intended to file a bankruptcy petition.[clxiv] On November 12, the company filed a diversity lawsuit in the Southern District of New York seeking rescission of the contract based on fraudulent inducement.[clxv] F&C cross-moved for a stay pending arbitration, arguing that any question as to fraud in inducement was for the arbitrators and not the District Court.[clxvi] The District Court granted F&C's motion.[clxvii] The Second Circuit affirmed, holding that, under their *Devonshire* precedent, a broad arbitration clause made any defense of fraud in inducement in the entire contract, rather than just the arbitration clause, one that arbitrators' could review.[clxviii] Although New York law would command a different result, the FAA's "national substantive law" superseded that state rule.[clxix]

Prima Paint filed a petition for *certiorari* in August of 1966.[clxx] White, Stewart, Harlan, Warren, and Black all voted to grant the writ.[clxxi] The reason for Black's vote can be surmised. *Prima* "raised the same issues"[clxxii] as *Devonshire*: whether the FAA was a substantive statute, and whether arbitrators could decide fraud in inducement defense. *Prima* was a great chance for Black to strike down both those holdings. Indeed, the party's merits briefs in *Prima*, as well as an *amicus* brief filed by the American Arbitration Association on respondent's behalf,[clxxiii] generally addressed the same matters that *Devonshire* ruled on.[clxxiv] Oral argument in the case made even more clear that, for Black at least, *Prima* was a proxy battle on *Devonshire*. Black was silent for most of Prima Paint's argument in favor of referring their fraud claim to the District Court. However, when Flood & Conklin's lawyer, one Martin Coleman, arrived to endorse *Devonshire*, Black sent him a string of stern rebukes.[clxxv] At one point, Coleman asserted that the FAA was meant to eliminate common law courts' "hostility to arbitration on the theory that it divested courts of its jurisdiction…" Black interrupted, "which it does." Coleman admitted that it did but added

that Congress "passed [the Federal Arbitration Act" in derogation of the common law." Black responded, "Which was subjected to charges that it was unconstitutional." Coleman said, in a sheepish tone, "I don't believe so, your honor..."[clxxvi] Later, when Gerald Aksen of the American Arbitration Association, took the stand, Black tied up the lawyer in questions about–of all things–AAA's founding date.[clxxvii]

Prima would be a close case at its March 17 conference.[clxxviii] Earl Warren was the first to speak.[clxxix] One would imagine that Warren would vote to reverse. After all, a vote to affirm in *Prima* was a vote in favor of *Devonshire*, and Warren was the *only* Justice who joined Black's *Moseley* concurrence specifically refuting that case. Yet Warren voted to affirm without much explanation, only making a conclusory statement that the FAA created federal substantive law that applied in diversity cases.[clxxx] Black voted to reverse without any recorded explanation, as did Douglas.[clxxxi] Justice Harlan, who already endorsed *Devonshire* during *Moseley*'s Conference, voted to affirm, reiterating that Congress enacted the FAA as a substantive statute under its Commerce Clause Power. Potter Stewart began a long talk about how they may need to return to the FAA's limited original intent. His view of the case was unclear; Douglas originally wrote down that Stewart wanted to affirm, but later switched Stewart's vote to a reversal.[clxxxii] The last three justices, White, Abe Fortas, and Brennan, all voted to affirm without much discussion. *Prima* left conference as a 6-3 vote in favor of Flood & Conklin and *Devonshire*. Fortas was assigned the majority opinion.[clxxxiii]

Abe Fortas began drafting a terse majority opinion for *Prima*.[clxxxiv] First, the contract "[evinced] a transaction in interstate commerce" for FAA purposes; this was a Maryland corporation buying a New Jersey business.[clxxxv] He then turned to the case's central issue of whether arbitrators could review fraud in inducement defenses. Fortas referred to § 4 of the FAA,

which lays out that a federal court can only enforce arbitration clauses once it is satisfied that "the *making* of the agreement for arbitration or the failure to comply (with the arbitration agreement) [was] not in issue [emphasis added]."[clxxxvi] For Fortas, the way that "making" related to "agreement for arbitration" meant that "a federal court may consider only issues relating to the making and performance of the [actual] agreement to arbitrate."[clxxxvii] Federal courts could only review fraud in inducement challenges to contracts containing arbitration clauses when the challenge centered on the specific clause rather than the entire contract.[clxxxviii] Fortas also held that the FAA was a substantive statute which authorized federal courts to generate rules of decision in diversity cases.[clxxxix] He then pushed Prima Paint's dispute with F&C into arbitration, because their fraud defense centered on the entire contract, rather than the arbitration clause.[cxc]

Fortas's opinion was short and direct, almost to the point of curtness. Its central holding and arguments remained the same throughout the editing process, although its specific language and structure did change somewhat.[cxci] The case would not completely affirm *Devonshire*,[cxcii] but enshrined its three central holdings: the FAA was substantive law, arbitration clauses were "separable," and fraud-in-inducement defenses could be reviewed by arbitrators. After *Prima* circulated, Warren, Clark, and Brennan joined Fortas's draft without the slightest comment.[cxciii] Byron White did the same with just one edit. White asked Fortas if he needed a footnote pushing federal courts presiding over diversity cases to at least consult state law whenever it significantly conflicted with the federal rule.[cxciv] Fortas responded that "he was inclined to strike" the footnote, and only included it because of the "bitchy problem" of his "[general] inclination…to reduce federal law–to use state substantive rules unless there is a pretty clear and strong reason to apply federal law…Otherwise e.g. there might be a different standard in inducement of the arbitration clause and fraud-in-inducement of the contract itself."[cxcv] Fortas's evident issues with his own

holding did not prevent him from cutting that footnote.[cxcvi] For the majority, *Prima* was to be a short decision which firmly established the Federal Arbitration Act's power over states and fraud defenses. To quote Black in *Moseley*, there was "no room for half-measures."[cxcvii]

Black began drafting a dissent by hand after reading Fortas's opinion. His words were vicious from the start: "The Court here holds to me what it is fantastic, that the legal issue of the contracts voidness because of fraud is to be decided by persons designated to arbitrate the factual controversy between the contracting parties…the arbitrators the Court holds are to adjudicate the legal validity of the contract…in all probability will be non-lawyers wholly unqualified to decide legal issues. I am by no means sure that forcing persons to forego their opportunity to [try] their legal issues in the courts denies them due process. I am fully satisfied that Congress did not impose any such un-American procedures in the Arbitration Act."[cxcviii] Black's dissent grew from this intro. He first attacked *Prima*'s central holding that arbitrators could rule on fraud in inducement defenses. Displaying the consistency of his arbitration views, Black made this argument by reiterating arguments developed in his earlier *Moseley* memo: a colorable fraud accusation put the "making" of the contract, and any arbitration clause contained within it, into issue.[cxcix] He also pointed out that the Court's holding contravened the institutional competency of courts' and arbitrators. Arbitrators could quickly resolve disputes related to day-to-day contractual performance.[cc] Yet courts had more expertise in fraud proceedings and could "determine with little delay" that arbitration should proceed if claims were specious.[cci] Black closed at his most pointed: "the only advantage of submitting the issue of fraud to arbitration is for the arbitrators. Their compensation corresponds to the volume of arbitration they perform. If they determine that a contract is void because of fraud, there is nothing further for them to arbitrate. I think it raises

serious questions of due process to submit to an arbitrator an issue which will determine [their] compensation."[ccii]

Black's dissent did not only respond to *Prima*. The Justice also took aim at the case to which he gave "credit for the creation of a rationalization to justify this statutory mutilation": *Devonshire*.[cciii] Black described *Devonshire*'s holding that the FAA was enacted as substantive law as a ploy to avoid the statute's "emasculation" by states.[cciv] He cited a number of statements from the FAA's legislative history stating that the bill was "establishing a procedure,"[ccv] and "does not involve any new principle of law."[ccvi] He also pointed out that the FAA does not provide an independent federal-question basis for jurisdiction.[ccvii] He then related his *Devonshire* attacks back to the majority opinion. The FAA just placed arbitration agreements "on the same footing as other contracts."[ccviii] The Court's new separability rule made arbitration clauses *supreme* over other contracts, which required rescission-in-whole rather than in "tidbits."[ccix] Black closed by arguing that the Supreme Court, in following *Devonshire*, a case "whose creator practically admitted was judicial legislation," was just looking to "promote the policy of arbitration."[ccx]

Black's dissent circulated on June 1.[ccxi] Fortas's notes on the draft were incredulous. He reiterated that he viewed the FAA's language on the "making" of the agreement as only "pertaining to the arbitration clause."[ccxii] In response to Black's claim that courts had more expertise with fraud claims than arbitrators, he pointed out that "a lot want [non-expert] juries to decide it."[ccxiii] At one point, when Black quoted one of the FAA's private-sector drafters as to the bill's intent, Fortas wrote "this is the sponsor?...They're just lobbyists."[ccxiv] Perhaps one of the other Justices spoke to Black about toning down his rhetoric. The next day, Black recirculated the draft with one descriptor removed: "un-American."[ccxv] Yet the diplomatic Harlan also wrote Fortas the day after Black's draft circulated: "in view of Hugo's strong treatment, you might wish to consider, if time

permits, a more full-dress exposition of the majority side..."[ccxvi] Fortas did edit his opinion in subtle ways, such as taking more time to substantiate his holding that the FAA was a substantive law enacted under the Commerce Clause.[ccxvii] Black responded by adding his own footnote saying that Fortas's evidence showed that the Act applied to commerce generally, but did not reflect a Congressional intent to enact the FAA under the Commerce power.[ccxviii] Black's dissent was immediately joined by Potter Stewart.[ccxix] Within a week of its circulation, William Douglas joined it as well.[ccxx] Yet none of the justices who voted against Black at conference switched their vote.

The Court issued *Prima Paint* on June 12, 1967.[ccxxi] Added in was a short concurrence from Justice Harlan explicitly endorsing *Devonshire* over the majority's slightly different reasoning.[ccxxii] Reaction to the case was muted, as is usually the case for arbitration decisions. The decision impacted some federal litigation.[ccxxiii] A Law Review article questioned whether it withheld too much power from courts.[ccxxiv] Only one group truly celebrated it: the corporate law community. *The Business Lawyer* vigorously applauded *Prima*'s expansion of the scope of contractual arbitration clauses.[ccxxv] After decades of lobbying, big business was finally getting the liberal arbitration grants they always sought.

It is notable that *Prima*'s written record does not reveal the kind of active lobbying by Black, through letters to "swing" justices or "memos for the conference," that occurred in *Moseley*. It is possible that deliberations occurred outside the written record. However, it is also possible that, by this point, Black knew how unpopular his positions were becoming. Arbitration had been pushed by the business community for a long time.[ccxxvi] Courts were more accepting of the practice.[ccxxvii] Given how close-run deliberations over *Wilko* and *Moseley* were, he may have been lucky to keep a case like *Prima* away for as long as he did. It certainly did not help that *Prima* arrived when Black was growing increasingly old, reserved, and out of touch with the rest of the

Court.[ccxxviii] By 1967, younger justices like William Brennan were becoming the main driver of majorities.[ccxxix] Black increasingly took the role of a silent, elder statesman. He remained a keen advocate for his old positions but was increasingly unable to bring new people over to them.[ccxxx] In addition, it should be noted that arbitration was, and remains, an extremely low-salience issue. The Warren Court took on a wide number of issues with greater importance to the press, historians, and most of the Justices - race, religious liberty, freedom of speech. Compared to all these, a paint company's choice of forum for their fraud defense may have barely registered for the rest of the Justices. For all the Justices, that is, except Hugo Black.

V. Conclusion – *Prima* to *Gideon*

Black's views on arbitration are best understood as one manifestation of the Justice's broader interest in protecting each individual's constitutional right to a "day in court." Black truly believed in the virtues of neutral courts with strong procedural protections and juries of one's peers. That belief shines through his written arbitration materials. Black's notes on Reed's *Wilko* opinion, his *Moseley* memo, and the *Prima* dissent, consistently express the view that arbitration should not be allowed to erode individuals' constitutional right to bring claims in a court of law. Of course, the rest of the Warren Court also defended the right to trial.[ccxxxi] Yet, in *Prima*, a majority still voted to facilitate possible banishment of legal claims to private forums run by individuals with compromising financial interests. Only Black, the former trial lawyer and New Deal senator, truly understood how arbitration could abridge that right, and fought against it in every case he could. Black's attempts to do so are consistent with the rest of his decisions on the Warren Court. Indeed, certain sections of the *Moseley* memo, such as the statement that the FAA should not be construed to take away the "ancient, treasured right to judicial trials in independent courts according to due process of law,"[ccxxxii] recall a more famous Black quote from a more

famous decision: "our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."[ccxxxiii] For Hugo Black that precious right to a fair trial should not be taken away through a mere signature on pre-drafted paper.

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[i] *See* Local 174 Teamsters, Chauffeurs, Warehousemen & Helpers of America, v. Lucas Flour Company, 369 U.S. 95, 107-10 (1962); James B. Carey, as President of the Int'l Union of Electrical, Radio & Machine Workers, AFL-CIO v. Westinghouse Electric Corp., 375 U.S. 261, 274-76 (1964) (J. Black dissenting), Republic Steel Corp. v. Charlie Maddox, 379 U.S. 650, 660-70 (1965) (J. Black dissenting); Florence Simmons v. Union News Co., 382 U.S. 884, 884-88 (1965) (J. Black dissenting); Manuel Vaca et al. v. Niles Sipes, Administrator of the Estate of Benjamin Owens, Jr., Deceased., 386 U.S. 171, 204-10 (J. Black dissenting) (1967) Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 407-25 (1967) (J. Black dissenting). *See also*, Sinclair Refining Co. v. Semuel M. Atkinson et al., 370 U.S. 370, 370 (foreclosing federal court injunctions against strikes even when utilized to enforce mandatory arbitration agreements within collective bargaining agreements in a majority opinion by Black); Commonwealth Coatings Corp., v. Continental Casualty Co., et al., 393 U.S. 145, 145 (1968) (holding that courts could set aside arbitral awards were relevant financial biases were not disclosed through a decision in an opinion by Black); H.W. Moseley v. Electronic & Missile Facilities, Inc., et al., 374 U.S. 167 (1963) (discussed *infra* at p. 10-21).

[ii] *See*, *e.g.*, *Republic Steel*, 379 U.S. at 669 (J. Black dissenting) (arguing against the Court's grant of mandatory arbitration based in part on "a vast difference between [the Court's] philosophy and mine concerning…the role of courts in our country…it was in [Magna Carta] that there originally was expressed in the English-speaking world a deep desire of people to be able to see differences according to standard, well-known procedures in courts. Because of these deepseated desires, the right to sue and be sued in courts according to the 'law of the land' became recognized…); *Prima Paint*, 388 U.S. at 407 (J. Black dissenting) ("I am by no means sure that forcing a person to forgo his opportunity to try his legal issues in the courts where, unlike the situation in arbitration, he may have a jury trial and right to appeal, is not a denial of due process of law.").

[iii] *See* Wilko v. Swan, 346 U.S. 427, 428-29 (1953).

[iv] *See Prima Paint*, 388 U.S. at 395.

[v] 9 U.S.C. § 2.

[vi] *Prima*, 388 U.S. at 404-05. This decision implicitly overruled a 1956 Supreme Court holding that the Federal Arbitration Act was a procedural statute that could "affect the rule of decision," and could violate *Erie R. Co. v. Tompkins* if applied to override contrary state law. *See* Norman C. Bernhardt v. Polygraphic Company of America, Inc., 350 U.S. 198, 198 (1956).

[vii] *Prima*, 388 U.S. at 402-04.

[viii] *See*, *e.g.*, Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 638, 654-59 (1996) (discussing how *Prima* started to expand the FAA's scope); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Act Never Passed By Congress*, 34 FLA. ST. U. L. REV. 99, 114-23 (relaying how *Prima* paved the way to allow FAA application to states); Pierre H. Bergeron, *At the Crosroads of Federalism and Arbitration: The Application of Prima Paint to Purportedly Void Contracts*, 93 KY. L. J. 423, 426-34 (2004) (discussing *Prima*'s creation of a seperability doctrine for arbitration clauses); J. Maria Glover, *Mass Arbitration*, STAN. L. REV. at 52 n.326 (forthcoming) (last revised: Nov. 6, 2021) *available at* SSRN (discussing *Prima* as the first in a long line of FAA Supreme Court precedent expanding the statute).

[ix] *Prima*, 388 U.S. at 416 (J. Black dissenting).

[x] UNITED STATES SENATE, *Lobbyists,* (Sep. 28, 1987) (last updated 1989) *available at* Perma (quoting Hugo Black's radio address in relation to a bill opposed by private utility lobbyists).

[xi] *See* Virginia Van der Veer Hamilton, *HUGO BLACK: THE ALABAMA YEARS,* Univ. of Alabama Press at 178 (1982) *available at* Google Books.

[xii] *See* Roger K. Newman, *HUGO BLACK: A BIOGRAPHY*, Fordham Univ. Press, 217-18 (1997).

[xiii] *See*, *id.* at 154.

[xiv] *See*, *e.g.*, Insurance Co. v. Morse, 22 L.Ed. 365 at 365 (1874).

[xv] Their holdings followed an ancient common-law doctrine against the practice. *See*, *e.g.*, Vynoir's Case, 8 Co. Rep. 81b et seq. (1609). *See, also*, Steven A. Certilman, *A Brief History of Arbitration in the United States*, N.Y.S. DISP. RESOL. LAWYER 10, 10-13 (discussing arbitration in the early Republic).
[xvi] *See* Julius Cohen & Henry Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV., 265, 270 (1926) (describing the Act's limited intent).
[xvii] *See*, *e.g.*, Moses, *supra* note 8, at 105-12, (describing how the act's supporters did not believe that it would apply to any workers or consumers, and the act's own drafters believed it would not apply to important statutory claims); Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L.R. 1939, 1964-90 (arguing that the FAA was intended only to redress federal court procedural failings court as part of a wider 1930s legal reform movement); Imre S. Szalai, *The Consent Amendment: Restoring Meaningful Consent and Respect for Human Dignity in America's Civil Justice System*, 24 VA. J. SOC. POL'Y & L. 195, 203-07 (describing how the FAA was not intended to apply in state court); Richard Frankel, *The Arbitration Clause as Super Contract*, WASH. U. L. REV., 531, 538-40 (2014) (discussing how the statute was not intended to intrude on state substantive law).
[xviii] *Prima Paint*, 388 U.S. at 409 n.2 (*citing* 50 A.B.A.Rep. 357 (1925)). Black's claim is accurate. *See* Moses, *Statutory Misconstruction*, *supra* note 8 at 101 (relaying how the FAA's principal drafters, Julius Cohen and Charles Bernheimer, were drawn from the New York State Chamber of Commerce, and "organized the support of the national business organizations" in favor of the bill).
[xix] As discussed *infra*, at p. 17-18. These concerns existed in debates over the statute's passage. For example, in committee debates related to the bill, Senator Bill Walsh of Montana raised concerns that arbitration clauses might be imposed by powerful actors on consumers or employees in order to foreclose legal claims. *See* Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9-11 (1923).
[xx] *See* Newman, *supra* note 12 at 34 (describing Black's "devout belief in the jury system" as beginning during his years in Alabama trial courts); 372 (relaying one of Black's major legal goals as "ensuring a fair trial in accordance with constitutional safeguards").
[xxi] *Wilko*, 346 U.S. at 346.
[xxii] *Moseley*., 374 U.S. at 167.
[xxiii] *See Prima*, 388 U.S. at 388.
[xxiv] Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir., 1959).
[xxv] *See Prima*, 388 U.S., 402-25 (J. Black dissenting).
[xxvi] *See Wilko*, 346 U.S. at 428-29.
[xxvii] *See, id.* at 429.
[xxviii] *See* Brief for the Securities and Exchange Comm'n as Amicus Curiae, *Wilko v. Swan*, No. 39, 1953 WL 78482 at *6-8 (1953).
[xxix] *Wilko*, 346 U.S. at 429-30.
[xxx] Wilko v. Swan, 107 F. Supp. 75, 76 (S.D.N.Y., 1952).
[xxxi] Wilko v. Swan, 201 F.2d 439, 439 (2d. Cir., 1953).
[xxxii] *Id.* at 444. (J. Clark, dissenting).
[xxxiii] *Wilko*, 201 F.2d at 446 (J. Clark Dissenting).
[xxxiv] *See* Wilko v. Swan, et al., 345 U.S. 969 (1953).
[xxxv] *See*, *e.g.*, Park Constr. Co. v. Indep. School Dist. No. 32, 296 N.W. 475, 477 (Minn. 1941) (expressing disapproval of the old "ouster doctrine").
[xxxvi] *See*, *Washington Checklist: Supreme Court to Hear Investor's Complaint on His Margin Account*, WALL ST. JOURN., p. 3 (Jun. 2, 1953), *available at* ProQuest Historical Newspapers (citing the New York Stock Exchange for this statistic).
[xxxvii] *See*, *e.g.*, Kulukundis Shipping Co. S/A v. Amtorg Trading Corporation, 126 F.2d 978, 986 (2d Cir., 1942) (refusing to submit a maritime dispute to arbitration).
[xxxviii] *See* Cohen & Dayton, *supra* note 16 at 270 (describing the Act's limited intent).
[xxxix] The Court ruled on four cases related to the FAA before 1953, all of which implicated maritime law. *See* Shanferoke Coal & Supply v. Westchester Service Corp., 293 U.S. 449 (1935); Schoenamsgruber v. Hamburg American, 294 U.S. 449 (1935); Marine Transit Corp. v. Dreyfus et al., 284 U.S. 263 (1932); The Anaconda v. American Sugar Refining Co., 342 U.S. 42, 45 (1944). In one, the Court declined to rule on whether a federal court could compel specific performance of an arbitration agreement which required state arbitration. *See*, *Shanferoke*, 293 U.S. at 452-53. In another, the Supreme Court granted parties' to a maritime transaction the right to proceed in *both* arbitration and federal court. *See*, *The Anaconda*, 342 U.S. at 45.
[xl] *See Supreme Court to Hear Investor's Complaint*, *supra* note TK. *See also*, "Bench Memo," Harold Burton Papers, Library of Congress, Madison Building, Box 224, at *4 (Oct. 21, 1953). (expressing worries that allowing

arbitration clauses in stock purchase agreements would allow the "trade to avoid the statute by sticking it in a clause requiring disputes to be arbitrated by their own boys.") [hereinafter "Burton *Wilko* Bench Memo].
[xli] *See* Request of Amicus Curiae to Participate in Oral Argument, William O. Douglas Papers, Library of Congress, Madison Building, Box 1146, Court Memoranda, No. 39 (Oct. 2, 1953).
[xlii] *See* Petition for Leave to Proceed *in Forma Pauperis*, Stanley F. Reed Papers, Univ. of Kentucky, Box 154, Folder 7, No. 39 (1953).
[xliii] *See* Brief for the Securities & Exchange Comm'n., *Wilko v. Swan*, at *6-8.
[xliv] *See* Petitioner's Brief, *Wilko v. Swan*, No. 39, 1953 WL 78483 at *3-4 (1953).
[xlv] *See* Request of SEC to Participate in Oral Argument, Earl Warren Papers, available at Georgetown University Law Center, Georgetown Law Library, Microfilm Collection, Reel 8, No. 39 (1953) (reproduced from the Collections of the Manuscript Division, Library of Congress).
[xlvi] Cert. Memo to CA 2, Earl Warren Papers, available at Georgetown University Law Center, Williams Library, Microfilm Collection, Reel 8, No. 39 at 6 (1953) (reproduced from the Collections of the Manuscript Division, Library of Congress).
[xlvii] Brief for the Securities & Exchange Comm'n, *supra* note at *20-22.
[xlviii] *Id.* At 14.
[xlix] *See* Brief for Respondents Joseph E. Swan, et al., Wilko v. Swan, No. 39, 1953 WL 78484 at *10-12 (Oct. 15, 1953). The FAA only made specific exemptions for "contracts of employment" involving seamen, railroad employees, and other workers engaged in interstate commerce. *See* 9 U.S.C. § 1.
[l] See *Wilko v. Swan* Record of Opinions Circulated, Robert Jackson Papers, Library of Congress, Madison Building, Box 184, No. 39, (1953) (displaying the date) [hereinafter "Robert Jackson *Wilko* Notes"].
[li] *See*, *Wilko v. Swan* Conference Notes, William Douglas Papers, Library of Congress, Box 1147, Argued Cases, *Wilko v. Swan*, No. 39 (1953) [hereinafter "Douglas *Wilko* Conference Notes"].
[lii] *See*, "Douglas *Wilko* Conference Notes," *supra* note 51. *See also*, "Robert Jackson *Wilko* Notes," *supra* note 51 (writing that Black said "could not be bound by arbitration").
[liii] *See* "Douglas *Wilko* Conference Notes", *supra* note 51.
[liv] *See, id.*
[lv] *See, id. See also*, *Wilko v. Swan* Conference Notes, Harold Burton Papers, Library of Congress, Madison Building, Box 239, No. 39 at *1-2 (showing a similar account of proceedings).
[lvi] *See* Docket Book, Harold Burton Papers, Library of Congress, Madison Building, Box 238, No. 39 (1953).
[lvii] *See, Wilko v. Swan* Draft Opinion, Stanley F. Reed Papers, University of Kentucky, Box 154, Folder 7, at *7 (1953) (showing heavily edited Reed drafts in which he attempts to rule the opposite way in *Wilko*).
[lviii] *See* "To the Conference", Stanley F. Reed Papers, University of Kentucky, Box 154, Folder 7 (Nov. 20, 1953).
[lix] *See Wilko v. Swan* Memorandum, Stanley F. Reed Papers, University of Kentucky, Box 154, Folder 6 at *1 (Nov. 20, 1953) (in which "memorandum by Reed" is crossed off and labeled "opinion").
[lx] *Id.* at 11.
[lxi] *Id.*
[lxii] *Wilko v. Swan* Memorandum, Stanley F. Reed Papers, University of Kentucky, Box 154, Folder 6, at *12 (Nov. 22, 1953).
[lxiii] *Id.* at 5-6.
[lxiv] *Id.* at 11.
[lxv] *Wilko*, 346 U.S. at 427.
[lxvi] *Id.*
[lxvii] *See*, *id.* at 438-39 (J. Jackson Concurring).
[lxviii] *See, id.* at 439-40. (J. Frankfurter, dissenting). Frankfurter's opposition was meaningful given his pivotal role in creating and implementing the Securities Act. *See* Adam C. Pritchard & Robert B. Thompson, *Securities Law and the New Deal Justices*, 95 VA. L. REV. 842, 842 (2009) (describing Frankfurter's "pervasive" involvement with the securities laws).
[lxix] *See*, *Wilko* 346 U.S. at 440 (J. Frankfurter dissenting).
[lxx] *See also*, *Polygraphic* 350 U.S. at 198 (holding, in a majority opinion that Black joined, that the FAA was a procedural statute and did not supersede state law).
[lxxi] *See Moseley*, 374 U.S. at 167.
[lxxii] *See*, *id.*
[lxxiii] *See* 40 U.S.C. § 3133.
[lxxiv] *See Moseley*, 374 U.S. at 168.
[lxxv] *See* Electronic & Missile Facilities, Inc. v. U.S. for Use of Moseley, 306 F.2d 554, 555 (1962).

[lxxvi] *See, id*. at 554, 555-58. Judge Richard Rives, in dissent, said allowing arbitration of this claim would run against the intent of the Miller Act. *See, id*. at 558-60 (J. Rives dissenting).
[lxxvii] *See, id*. at 558.
[lxxviii] 271 F.2d 402 (2d Cir., 1959).
[lxxix] *Id*. at 406-09
[lxxx] *Devonshire*, 271 F.2d at 409-12.
[lxxxi] *See, id*. at 410 ("any doubts as to the construction of the Act ought to be resolved in line with its liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars.").
[lxxxii] *See Devonshire*, 362 U.S. at 909.
[lxxxiii] *See Prima Paint Corp. v. Flood & Conklin* Cert. Memo, William O. Douglas Papers, Library of Congress, Madison Building, Box 1380, No. 343 at *1 (Aug. 30, 1966) [hereinafter "Douglas *Prima Paint* Cert. Memo"].
[lxxxiv] *See* United States of the Use of H.W. Moseley, d/b/a Moseley Plumbing and Heating Company v. Electronic & Missile Facilities, 371 U.S. 919, 919 (1962).
[lxxxv] *See United States for the Use of H.W. Moseley d/b/a Mosely Plumbing and Heating Company vs. Electronic & Missile Facilities Inc., et al*. Docket Book, William O. Douglas Papers, Library of Congress, Madison Building, Box 1280, No. 401 [hereinafter "Douglas *Moseley* Docket Book"].
[lxxxvi] *See* Arthur J. Goldberg, *Memorandum to the Conference Re: No. 401 United States for the Use of H.W. Moseley d/b/a Mosely Plumbing and Heating Company vs. Electronic & Missile Facilities Inc., et al*, William O. Douglas Papers, Library of Congress, Madison Building, Box 1282, Office Memoranda, No. 401 (Nov. 19, 1962).
[lxxxvii] *See* "Douglas *Moseley* Docket Book," *supra* note 85.
[lxxxviii] *See* Brief of Petitioner, *U.S.A. for the use of Moseley v. Electronic & Missile*, No. 401, 1963 WL 105581 at *28-31 (Jan. 25, 1963) [hereinafter "*Moseley* Petitioner Brief"].
[lxxxix] *See* Brief of Respondents, *U.S.A. for the use of Moseley v. Electronic & Missile*, No. 401, 1963 WL 105582 at *6 (Feb. 28, 1963) [hereinafter "*Moseley* Respondents' Brief"].
[xc] *See* "*Moseley* Petitioner Brief," *supra* note 88, at *36-39.
[xci] *See* "*Moseley* Petitioner Brief," *supra* note 88 at *15-16.
[xcii] *See* "*Moseley* Respondents' Brief," *supra* note 89 at *17-21.
[xciii] *Id*. at *17.
[xciv] *See* Oral Argument, *Moseley v. Electronic & Missile Facilities, Inc*., No. 401, OYEZ, (Apr. 16, 1963) https://www.oyez.org/cases/1962/401.
[xcv] *See* Oral Argument, *Moseley v. Electronic & Missile Facilities, Inc*., No. 401, OYEZ, (Apr. 17, 1963) https://www.oyez.org/cases/1962/401.
[xcvi] *See*, *id*.
[xcvii] *See U.S. for Use of Moseley v. Electronic & Missile Facilities, Inc*. Conference Notes, Library of Congress, Madison Building, Box 1260, Argued Cases, No. 401 at *1 (1962) [hereinafter "Douglas *Moseley* Conference Notes"].
[xcviii] *See*, *id*.
[xcix] *See, id*. at *1-2.
[c] *See, id*. at *2-3.
[ci] *See*, *id*. at 2.
[cii] *See*, *id*. at *4.
[ciii] *See*, *id*. at *2-4.
[civ] *See, e.g.*, Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 25 No. 3 U.F.L.R. 373, 376 (Summer 1983).
[cv] Arbitration agreements were often utilized in exchange for no-strike clauses. *See generally,* W.E. Akin, *Arbitration and Labor Conflict: The Middle Class Panacea, 1886-1900*, 29 No. 4 THE LABOR HISTORIAN 565 (1967) (describing this process).
[cvi] 353 U.S. 448 (1957).
[cvii] *Id*. at 458.
[cviii] United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers v. Enterprise Wheel & Car Corp. 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).
[cix] *See United Steelworkers v. Warrior & Gulf*, 363 U.S. at 578.
[cx] *Id*. at 582-83.
[cxi] *Id*. at 585.
[cxii] *See, e.g.* Drake Bakeries, Inc. v. Local 50, Am. Bakery and Confectionary Workers Intern., AFL-CIO, 370 U.S. 254, 254 (1962); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 543 (1962) (upholding a previously negotiated

arbitration clause following a corporate merger). In *Drake*, Black admitted he "had some doubts about [enforcing arbitration]" in the case, but was "persuaded" by Justice White's opinion. *See Drake Bakeries v. Local 50* Draft, Byron White Papers, Library of Congress, Madison Building, at *12 (Jun. 11, 1962).

[cxiii] *See* Newman, *supra* note 12, at 195.

[cxiv] *See Carey v. Westinghouse*, at 275 (J. Black Dissenting). This section only scratches the surface of Black's dissents in labor arbitration cases. *See*, *Lucas Flour*, 369 U.S. at 107-10 (J. Black dissenting) (accusing the court of amending a contract in favor of a pro-arbitration policy preference); *Republic Steel v. Maddox*, 379 U.S. at 660-70 (J. Black dissenting) (making a range of arguments against requiring a steelworker to bring a damages claim through union grievance procedures before bringing any state court claim) *Simmons v. Union News*, 382 U.S. at 884-88 (1965) (J. Black dissenting) (dissenting from a denial of *certiorari* in a case involving a labor union which refused to bring a claim into greivance procedure); *Vaca v. Sipes*, 386 U.S. at 207 (J. Black dissenting) ("today the Court holds that an employee with a meritorious claim has no absolute right to have it either litigated or arbitrated…").

[cxv] Earl Warren and Tom Clark each joined him once; no other justices would. *See Simmons v. Union News*, 382 U.S. at 884-88 (1965) (J. Black dissenting); *Carey v. Westinghouse*, 375 U.S. at 275 (J. Black dissenting).

[cxvi] *See, e.g.*, Lee Modjeska, *Labor and the Warren Court,* 8 IND. RELATIONS L. J. 479, 479 (1986) ("the Warren Court supported the Wagner Act philosopies of strong unionism and vigorous support of the principle of collective bargaining...").

[cxvii] See, e.g., Brief for the Petitioner, *United Steelworkers of America v. Am. Manuf. Co.,* No. 360, 1960 WL 63603, at *29-41 (Mar. 11, 1960) (laying out the importance of arbitration to collective bargaining). Indeed, labor arbitration was important enough to unions that, during one 1965 case dealing with whether a union steelworker could bring a backpay claim in state court or had to initially bring the claim through labor grievance procedures, the AFL-CIO filed its first ever *amicus* brief taking an *employer's* side in an employee-employer dispute. *See* Brief for the American Federation of Labor and Congress of Indus. Orgs. as Amicus Curiae, *Republic Steel Corp. v. Maddox*, No. 43, 1964 WL 81230, at *1-6 (Aug. 18, 1964).

[cxviii] *See Sinclair v. Atkinson*, 370 U.S. at 228 (J. Brennan dissenting).

[cxix] *See also*, Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: AN Idea Whose Time Had Come*, 52 BAYLOR L. REV. 781 (Fall 2000) (analyzing essential similarities between commercial and labor arbitration law).

[cxx] *See Re: No. 401 – United States for the Use of H.W. Moseley d/v/a Moseley Plumbing and Hearing Company v. Electronic & Missile Facilities, Inc., et al*; Hugo L. Black Papers, Library of Congress, Madison Building, Box 373 (Apr. 22, 1963). The letter argued that a decision in favor of respondent in *Moseley* would overturn the Court's 1956 holding in *Polygraphic* that the FAA was a procedural statute which did not apply in state courts. *See Polygraphic*, 350 U.S. at 198.

[cxxi] *See* Letter to Arthur Goldberg, Hugo L. Black Papers, Library of Congress, Madison Building, Box 373, Moseley v. Electronic and Missile Facilities at *1 (Apr. 23, 1963) [hereinafter "Black Goldberg Letter"].

[cxxii] *See* Note from Clerk Clay to Hugo Black, Hugo L. Black Papers, Library of Congress, Madison Building, Box 373, Moseley v. Electronic and Missile Facilities (Apr. 1963).

[cxxiii] *See* "Black Goldberg Letter," *supra* note 121, at *1.

[cxxiv] *See* Memorandum for the Conference by Mr. Justice Black, Justice William J. Brennan Papers, Library of Congress, Madison Building, Box 373, United States *ex rel.* Moseley v. Electronic & Missile Facilities (May 31 1963) [hereinafter "Black *Moseley* Arbitration Memo"].

[cxxv] *See*, *id.* at 6.

[cxxvi] *See*, *id.* at 26-29.

[cxxvii] *See, id.* at 23-25.

[cxxviii] *See, id.* at 26.

[cxxix] *Id.*

[cxxx] "Black *Moseley* Arbitration Memo," *supra* note 124, at 26.

[cxxxi] *See, id.* at 3-14.

[cxxxii] *See, id.* at 14-24.

[cxxxiii] *Id.* at 23.

[cxxxiv] *Id.* at 21.

[cxxxv] *Id.* at 15.

[cxxxvi] *Id.* at 15-20.

[cxxxvii] *Id.*

[cxxxviii] "Black *Moseley* Arbitration Memo," *supra* note 124, 21-22.

[cxxxix] *Id.* at 22.

[cxl] *See, id.* (citing Joint Hearings before the Subcommittees of the Committee on the Judiciary on S. 1005 and H.R. 646, 68th Cong., 1st Sess. 35 (1924)).
[cxli] Black *Moseley* Arbitration Memo, *supra* note 124, at 23.
[cxlii] Draft Opinion, William J. Brennan Papers, Library of Congress, Madison Building, Box I:92, Folder 62-401, United States *ex rel* Moseley v. Electronic & Missile Facilities, at 1-7 (Jun. 4, 1963).
[cxliii] *Id.* at 4-6.
[cxliv] *See* Memo for the Conference, Hugo L. Black Papers, Library of Congress, Madison Building, Box 373, Moseley v. Electronic and Missile Facilities (June 3, 1963) (crossing out "memo" and writing "dissent").
[cxlv] *Moseley* Memo, Tom Clark Papers, University of Texas, Box A146, Folder 11, at *1 (May 1963).
[cxlvi] Letter from Arthur Goldberg to Tom Clark, "Re: No. 401 – U.S. for Use of Moseley etc. v. Electronic & Missile Facilities", University of Texas, Box A146, Folder 11, at *1-2 (Jun. 5, 1963).
[cxlvii] *See Moseley* Circulated Draft Opinion, Tom Clark Papers, University of Texas, Box A146, Folder 11, at *1 (Jun. 5, 1963).
[cxlviii] Note from Tom Clark to William Douglas, William O. Douglas Papers, Library of Congress, Madison Building, Box 1283, Office Memoranda, Miscellaneous (June 5, 1963).
[cxlix] *See Moseley*, 371 U.S. at 167.
[cl] *See*, *id.*, at 168-72.
[cli] *See*, *id.* at 172-72 (J. Black concurring).
[clii] *Moseley*, 371 U.S. at 172 (J. Black Concurring).
[cliii] *See* "Burton *Wilko* Bench Memo," *supra* note 40, at *4.
[cliv] See Francis P. McQuade & Alexander T. Kardos, *Mr. Justice Brennan and His Legal Philosophy*, 33 NOTRE DAME L. REV. 321, 325 (1958).
[clv] *See* "Douglas *Moseley* Conference Notes," *supra* note 97, at *2.
[clvi] *See*, *e.g.*, Southland Corp. v. Keating, 456 U.S. 1, 10-16 (1984) (holding that the FAA completely displaced state law).
[clvii] *See* Newman, *supra* note 20, at 546 (describing frustration at "Clark's pogo-stick-like unpredictability").
[clviii] *See Lincoln Mills*, 353 U.S. at 448.
[clix] *See United Steelworkers v. Warrior & Gulf*, 363 U.S. at 564.
[clx] This reality once made Black quip about Warren that he "wished he knew a little more law." *See*, *id.* at 566.
[clxi] *Moseley*, 371 U.S. at 172 (J. Black Concurring).
[clxii] *See Prima Paint.*, 388 U.S. at 397.
[clxiii] *Id.* At 398.
[clxiv] *Id.*
[clxv] *Id.* at 398-99.
[clxvi] *Id.* at 399.
[clxvii] *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 262 F. Supp. 605, 607 (S.D.N.Y., 1966).
[clxviii] *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 360 F.2d 315, 317 (2d Cir., 1966).
[clxix] *Id.* at 318. This holding mattered because this was a New York contract, and New York law required the matter to be remanded to the District Court. *See Prima Paint Corp. v. F&C Mfg. Co.* Cert. Memo, Tom C. Clark Papers, University of Texas, Box 218, Folder 5, No. 343 at *1 (1966) (indicating this in a written note).
[clxx] *See* "Douglas *Prima Paint* Cert. Memo," *supra* note 83, at *2.
[clxxi] *See Prima Paint v. F&C Conklin* Docket Book, William O. Douglas Papers, Box 1373, Library of Congress, Madison Building, No. 343 (1967). [hereinafter "Douglas *Prima Paint* Docket Book"].
[clxxii] "Douglas *Prima Paint* Cert. Memo," *supra* note 83, at *1.
[clxxiii] *See* Brief of the American Arbitration Association as Amicus Curiae in Support of Respondent, *Prima Paint v. Flood & Conklin Mfg. Co.*, No. 343 1967 WL 113919 at *4-5 (1966) (warning that a finding against "seperability" would frustrate the intent of "thousands of commercial businessmen" who utilized arbitration clauses).
[clxxiv] *See* Brief for the Petitioner, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, No. 343, 1967 WL 113916 at *12-24 (1967) (arguing that arbitration clauses are not "seperable" and due process required a judicial interpretation of whether the parties actually agreed to arbitrate); Brief for Respondent, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, No. 343, 1967 WL 113917 at *7-21 (1967) (citing *Devonshire* throughout to support its argument that the FAA was substantive and arbitrators could review fraud claims); Reply Brief for Petitioner and Brief for Petitioner in Opposition to the Motion and Brief of the American Arbitration Association as Amicus Curiae, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, No. 343, 1967 WL 113918 at *20-22 (arguing that the existence of fraud negates the existence of any valid contract or arbitration clause within it)

[clxxv] *See* Oral Argument, *Prima Paint Corporation v. Flood & Conklin Mfg. Company*, OYEZ, (Mar. 16, 1967) https://www.oyez.org/cases/1966/343.
[clxxvi] *Id.*
[clxxvii] *See*, *id.*
[clxxviii] *See Prima Paint Corp. v. Flood & Conklin Mfg* Docket Sheet, William O. Douglas Papers, Library of Congress, James Madison Building, Box 1373, No. 342 (1967) [hereinafter "Douglas *Prima* Docket Sheet"].
[clxxix] *See Prima Paint Corp. v. Flood & Conklin Mfg*. Conference Notes, William O. Douglas Papers, Library of Congress, James Madison Building, Box 1373, No. 343 at *1 (Mar. 17, 1967). [hereinafter "Douglas *Prima* Conference Notes"].
[clxxx] Warren's Bench Memo on *Prima* is absent from the Congressional archives. We do not know his reasoning for this switch. However, one could point out that Warren's relationship with Black had grown frosty by this point; Warren said in early 1966 following disagreements in certain cases that "Black has hardened and gotten old. It's a different Black now." *See* Newman, *supra* note 20, at 570.
[clxxxi] Douglas's attitude towards the merits is not recorded in his own conference notes or *certiorari* memo. However, his *certiorari* memo does mention that the lower court decision "flies in the face of Bernhardt v. Polygraphic Co." *See* "Douglas *Prima* Cert. Memo," *supra* note 83, at *1. Given that Douglas wrote *Bernhardt*, it is possible he did not appreciate how *Prima* threw that opinion into question.
[clxxxii] *See* "Douglas *Prima* Conference Notes," *supra* note 177, at *2.
[clxxxiii] *See* "Douglas *Prima* Docket Sheet," *supra* note 176.
[clxxxiv] *See Prima Paint Corp. v. Flood & Conklin Mfg. Co*. Draft, Abe Fortas Papers, Yale Univ. Lib., Box I:41, Folder 837 at *1 (1966) [hereinafter Fortas *Prima* Draft].
[clxxxv] *See id.* at *7-8.
[clxxxvi] *See* Fortas *Prima* Draft, *supra* note 182, at *7-8.
[clxxxvii] *See Prima*, 388 U.S., at 404.
[clxxxviii] This holding implicitly made such agreements "separable" from the rest of their contract.
[clxxxix] *See Prima,* 388 U.S. at 404-05.
[cxc] *Id.* at 405.
[cxci] *Compare* Fortas *Prima* Draft *supra* at *1-15 (ruling that the transaction involved interstate commerce, the FAA was substantive, and fraud-in-inducement claims could be referred to arbitrators) to *Prima*, 388 U.S. at 401-07 (making the same holdings in a different order).
[cxcii] Fortas did not apply the FAA to completely supersede state law or include *Devonshire*'s language that contractual arbitration clauses were to be liberally construed. *See Devonshire*, 271 F.2d at 404-05, 410.
[cxciii] *See* Letter from Earl Warren to Abe Fortas, "Re: No. 343 – Prima Paint v. Flood & Conklin Mfg.," (Jun. 1, 1967); Letter from Tom C. Clark to Abe Fortas, "Re: No. 343, Prima Paint v. Flood and Conklin Mfg. Co." (May 19, 1967); Letter from William Brennan to Abe Fortas, "RE: No. 343 – Prima Paint v. Flood & Conklin Mfg. Co. (May 19, 1967); *all documents taken from* Abe Fortas Papers, Yale Univ. Lib., I:41, Folder 836.
[cxciv] *See* "Re: No 343 – Prima Paint Corporation v. Flood & Conklin Mfg. Co.," Byron White Papers, Library of Congress, Madison Building, Box I:105, Folder 66-343 (May 22, 1967).
[cxcv] *See* Note from Abe Fortas to Byron White, Byron White Papers, Library of Congress, Madison Building, Box I:105, Folder 66-343 (1967).
[cxcvi] *See Prima Paint v. Flood & Conklin* Circulated Draft, Byron White Papers, Library of Congress, Madison Building, Box I:105, Folder 66-343 (June 6, 1967).
[cxcvii] "Black Goldberg Letter," *supra* note 121.
[cxcviii] *Prima Paint* Draft Dissent, Hugo L. Black Papers, Library of Congress, Madison Building, Box 395, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1966) (handwritten draft).
[cxcix] *Id.* at 412-15.
[cc] *Compare* "Black *Moseley* Arbitration Memo," *supra* note 124, at 24-26 ("Section 4 of the Act, 9 U.S.C. § 4, requires that before a court may direct arbitration according to the parties' agreement, it must be satisfied 'that the making of the agreement for arbitration . . . is not in issue . . .when the existence is in dispute–as when the contract is alleged to have been procured by fraud–then arbitration cannot be compelled until this issue has been determined") and *Prima Paint*, 388 U.S. at 410-11 (J. Black Dissenting) ("Section 4 [of the FAA] merely provides that the court must order arbitration if it is 'satisfied that the making of the agreement for arbitration is not in issue.' …a general allegation of fraud in the inducement puts into issue the making of the agreement to arbitrate").
[cci] *See Prima*, 388 U.S. at 416 (J. Black dissenting).
[ccii] *Id.*
[cciii] *Prima*, 388 U.S. at 416 (J. Black dissenting).

[ccciv] *See*, *id.*
[cccv] *See*, *id.* at 418 n. 19 (quoting Committee on Commerce, Trade & Commercial Law, *The United States Arbitration Law and its Application,* 20 Ill. L. Rev. 11 A.B.A.J. 153, 154 (1925)).
[cccvi] *See*, *id.* at 419-20 (quoting 65 Cong. Rec. 1931 (1924)).
[cccvii] *See*, *id.* at 420, n.24 ("this seems implicit in § 3's provision for a stay by a 'court in which such suit is pending and § 4's provision that enforcement may be ordered by 'any United States district court which, save for such agreement, would have jurisdiction under Title 28…'").
[cccviii] *See, id.* at 423 (quoting H.R.Rep.No.96, 68th Cong., 1st Sess. (1924)).
[cccix] *Id.*
[cccx] *Id. at* 425 (J. Black dissenting). This argument was not a new one for Black; he frequently raised it Black in his dissents to the Court's labor arbitration cases. *See, e.g.*, *Lucas Flour*, 369 U.S. at 107-10 (J. Black dissenting) (accusing the court of amending a contract in favor of a pro-arbitration policy preference).
[cccxi] *See Prima Paint Corp. v. Flood & Conklin* Draft (J. Black Dissenting) Abe Fortas Papers, Box I:41, Folder 838 at *1 (Jun. 1, 1967) [hereinafter "Fortas Comments on Black *Prima* Dissent"].
[cccxii] *See id.* at *6.
[cccxiii] *See* "Fortas Comments on Black *Prima* Dissent," *supra* note 208, at *10.
[cccxiv] *See*, *id.* at *8.
[cccxv] See Prima Paint Corp. v. Flood & Conklin Draft (J. Black dissenting), Abe Fortas Papers, Box I:41, Folder 838 at *1 (Jun. 2, 1967).
[cccxvi] *See* John Marshall Harlan II to Abe Fortas, "Re: No. 343 – Prima Paint v. Flood & Conklin," Abe Fortas Papers, Yale Univ. Lib., I:41, Folder 836 (Jun. 1, 1967).
[cccxvii] *See Prima*, 388 U.S. at 405 n.13.
[cccxviii] *See Prima Paint v. Flood & Conklin* Draft Dissent, Hugo L. Black Papers, Library of Congress, Madison Building, Box 395, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* at 12 n.22 (Jun. 8, 1967)
[cccxix] *See Prima Paint v. Flood & Conklin* Draft Dissent, Hugo L. Black Papers, Library of Congress, Madison Building, Box 395, *Prima Paint Corp. v. Flood & Conklin Mfg. Co,* at *1 (Jun. 2, 1967) (showing Justice Stewart joining the opinion one day after circulation).
[cccxx] *See Prima Paint v. Flood & Conklin* Draft Dissent, Hugo L. Black Papers, Library of Congress, Madison Building, Box 395, *Prima Paint Corp. v. Flood & Conklin Mfg. Co,* at *1 (Jun. 7, 1967) (showing Justice Douglas joining the opinion).
[cccxxi] *See Prima*, 388 U.S. at 395.
[cccxxii] *See Prima*, 388 U.S., at 407 (J. Harlan Concurring).
[cccxxiii] *See, e.g.*, United States Gypsum Co. v. United Steelworkers of America, AFL-CIO, 384 F.2d 38, 49 (5th Cir., 1967) (citing *Prima* to send an issue to arbitration which was a "classic question for arbitral determination").
[cccxxiv] *See* Roger H. Broach, *Under the Federal Arbitration Act in a Diversity Suit an Allegation of Fraudulent Inducement to a Contract Involving Interstate Commerce Will Not Prevent Enforcement of a Broad Arbitration Clause in the Contract*, 46 TEX. L. REV. 260, 265-66 (December 1967).
[cccxxv] *See* Robert Coulson, *Prima Paint: An Arbitration Milestone*, THE BUSINESS LAWYER, Vol. 23, No. 1, 241 241-48 (November 1967).
[cccxxvi] *See*, e.g., Margaret Moses, *supra* note 8, at 100-12 (describing these efforts).
[cccxxvii] *See, e.g.*, *Devonshire*, 271 F.2d at 402.
[cccxxviii] *See* Newman, *supra* note 20, at 595.
[cccxxix] *See id.* at 569-70.
[cccxxx] *See* Newman, *supra* note 20, at 595. In Prima, it also likely did not help matters that the majority opinion was written by Abe Fortas, with whom Black had a very frosty relationship. *See*, *id.* at 589-90 (describing the tension between Fortas and Black as the true tension on the Court at this time).
[cccxxxi] *See generally*, A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 No. 2, Mich. L. Rev., 249 (1968) (describing the Warren Court's groundbreaking efforts to protect the rights of defendants in a range of cases).
[cccxxxii] "Black *Moseley* Arbitration Memo," *supra* note 124, at 22.
[cccxxxiii] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

Applicant Details

First Name	**Josceline**
Middle Initial	**M**
Last Name	**Sanchez**
Citizenship Status	**U. S. Citizen**
Email Address	**js5797@columbia.edu**
Address	**Address** Street **400 W 119th St** City **New York** State/Territory **New York** Zip **10027-7149** Country **United States**
Contact Phone Number	**13057780724**

Applicant Education

BA/BS From	**University of Miami**
Date of BA/BS	**May 2018**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**June 30, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Human Rights Law Review - Jailhouse Lawyer's Manual**
Moot Court Experience	**Yes**
Moot Court Name(s)	**National Thurgood Marshall Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Seo, Sarah
as2607@columbia.edu
Kessler, Jeremy
jkessler@law.columbia.edu
212-854-4947
Greene, Jamal
jamal.greene@law.columbia.edu
212-854-5865

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Josceline Sanchez
8185 NW 7th St. Apt. 409
Miami, FL 33126
(305) 778-0724
Js5797@columbia.edu

June 12, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a recent 2023 graduate of Columbia Law School, and I write to apply for a clerkship in your chambers beginning in 2024.

From August 2023 until August 2024, I will be clerking for Judge Gabriel Sanchez in the United States Court of Appeals for the Ninth Circuit. Accordingly, I am seeking a judicial clerkship in your chambers for the 2024-2025 term.

Enclosed please find a resume, transcript, and writing sample. Also enclosed are letters of recommendation from the following professors:
- Jamal Greene (212-854-5865, jamal.greene@law.columbia.edu);
- Sarah Seo (212-854-47797, sarah.seo@law.columbia.edu);
- Jeremy Kessler (212-854-4947, jkessler@law.columbia.edu).

Thank you for your consideration. Please do not hesitate to contact me should you need any additional information.

Respectfully,

Josceline Sanchez

JOSCELINE MELIZA SANCHEZ

8185 NW 7th St., Apt 409, Miami, FL • (305) 778-0724 • js5797@columbia.edu

EDUCATION

Columbia Law School, New York, NY
J.D. expected June 2023
Honors: James Kent Scholar, 2021-2022
Activities: *Jailhouse Lawyer's Manual*, Executive Articles Editor
Columbia Center for Institutional and Social Change, Paralegal Pathways Initiative, Curriculum Co-Chair, 2021-2022 & 2022-2023
Research Assistant, Professor David E. Pozen Fall '22 and Spring '23
Teaching Assistant, Criminal Law Spring '22
Columbia Center for Justice, Beyond the Bars Fellowship, Fall '21
National Thurgood Marshall Moot Court, Regional Finalist & National Quarterfinalist, Spring '21

University of Miami, Coral Gables, FL
Bachelor of Arts in Accounting, *magna cum laude*, received May 2018
Honors: Eloise Kimmelman Accounting Scholarship; Dean's List, Provost's and President's Honor Roll
Activities: Beta Alpha Psi (Accounting and Finance Honors society)

Miami Dade College, Miami, FL
Associate of Arts in Business Administration received May 2016

EXPERIENCE

Hon. Gabriel Sanchez, U.S. Court of Appeals for the Ninth Circuit, San Francisco, CA
Term Law Clerk Aug. 2023 – Aug. 2024

Federal Public Defender for the District of Columbia, Washington, D.C. May 2022 – Sept. 2022
Legal Intern
Drafted successful motion to suppress evidence in violation of defendant's 5th Amendment right to an attorney. Drafted appellant brief challenging discretionary denial of resentencing petition under the First Step Act. Drafted motion to dismiss indictment challenging the lawfulness of a pre-indictment delay. Conducted research and drafted memoranda regarding the spoilation of evidence, relevance of evidence, federal jurisdiction and other issues under the Federal Rules of Evidence, Federal Rules of Criminal Procedure, and 18 U.S.C. § 922 and § 924.

United States Attorney's Office for the Southern District of New York, New York, NY
Criminal Division Intern June 2021 – Aug. 2021
Performed legal research and drafted memoranda addressing issues of discovery obligations in civil and criminal joint investigations, constitutional standards on searches and seizures, and other statutory issues.

HLB Gravier, LLP, Miami, FL
Audit Associate February 2019 – Aug. 2020
Prepared financial statements, footnote disclosures, and supplementary schedules for governmental, non-profit. and for-profit entities in accordance with GAAP; performed analytical procedures over clients' financial and accounting records in accordance with GAAS; specialized on employee-benefit plan audits pursuant to ERISA regulations.

Transition, Inc., Miami, FL (non-profit, reentry organization)
Volunteer July 2017 – June 2020
Assisted with skill-development workshops and employment opportunities for clients; reviewed internal control procedures in accordance with single-audit and governmental standards; and assisted with grant proposals.

ADDITIONAL INFORMATION

Certifications: Certified Public Accountant License (CPA), Florida Board of Accountancy, 2020
Language Skills: Spanish (native)

Columbia Law School

Registration Services

law.columbia.edu/registration
435 West 116th Street, Box A-25
New York, NY 10027
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registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

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Program: Juris Doctor

Josceline M Sanchez

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6905-1	Antidiscrimination Law	Johnson, Olatunde C.A.	3.0	B+
L6293-2	Antitrust and Trade Regulation	Wu, Timothy	3.0	B
L6655-1	Human Rights Law Review		0.0	CR
L9160-1	S Paralegal Pathways Initiative Leadership Seminar	Genty, Philip M.	2.0	CR
L6472-1	S. Special Topics in Federal Courts	Schmidt, Thomas P.	2.0	A-
L6423-1	Securities Regulation	Fox, Merritt B.	4.0	
L6822-1	Teaching Fellows	Genty, Philip M.	2.0	CR

Total Registered Points: 16.0

Total Earned Points: 12.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6238-1	Criminal Adjudication	Richman, Daniel	3.0	B+
L6655-1	Human Rights Law Review		0.0	CR
L6250-1	Immigration Law	Gupta, Anjum	3.0	CR
L6474-1	Law of the Political Process	Briffault, Richard	3.0	A-
L6274-2	Professional Responsibility	Fox, Michael Louis	2.0	A-
L9160-1	S Paralegal Pathways Initiative Leadership Seminar	Genty, Philip M.	2.0	CR
L6683-1	Supervised Research Paper	Pozen, David	2.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6109-1	Criminal Investigations	Livingston, Debra A.	3.0	A-
L6241-1	Evidence	Capra, Daniel	4.0	A-
L6655-1	Human Rights Law Review		0.0	CR
L6776-1	Moot Court Student Judge	Bernhardt, Sophia	1.0	CR
L6208-1	S. Advanced Administrative Law: Regulatory Innovation and Judicial Review [Minor Writing Credit - Earned]	Kessler, Jeremy; Sabel, Charles F.	3.0	A-
L6683-2	Supervised Research Paper	Greene, Jamal	1.0	A
L6822-1	Teaching Fellows	Seo, Sarah A.	1.0	CR
L8517-1	Workshop on Facilitating Meaningful Reentry	Genty, Philip M.; Strauss, Ilene	3.0	CR

Total Registered Points: 16.0

Total Earned Points: 16.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6425-1	Federal Courts	Kent, Andrew	4.0	A-
L6655-1	Human Rights Law Review		0.0	CR
L6169-2	Legislation and Regulation	Kessler, Jeremy	4.0	A
L6675-1	Major Writing Credit	Greene, Jamal	0.0	CR
L8661-1	S. Supreme Court	Lefkowitz, Jay; Menashi, Steven	2.0	A
L6695-1	Supervised JD Experiential Study	Genty, Philip M.	1.0	CR
L6683-1	Supervised Research Paper	Greene, Jamal	2.0	A

Total Registered Points: 13.0

Total Earned Points: 13.0

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6108-4	Criminal Law	Seo, Sarah A.	3.0	A-
L6667-1	Frederick Douglass Moot Court	Strauss, Ilene; Yusuf, Temitope K.	0.0	CR
L6071-1	Law and Development	Pistor, Katharina	3.0	A-
L6130-6	Legal Methods II: Legal Theory	Purdy, Jedediah S.	1.0	CR
L6121-28	Legal Practice Workshop II	Yusuf, Temitope K.	1.0	P
L6116-4	Property	Purdy, Jedediah S.	4.0	B+
L6118-1	Torts	Merrill, Thomas W.	4.0	B

Total Registered Points: 16.0

Total Earned Points: 16.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-3	Civil Procedure	Genty, Philip M.	4.0	B+
L6133-5	Constitutional Law	Glass, Maeve	4.0	B+
L6105-3	Contracts	Emens, Elizabeth F.	4.0	B
L6113-4	Legal Methods	Briffault, Richard	1.0	CR
L6115-20	Legal Practice Workshop I	Kreiner, Evan Ross; Whaley, Hunter	2.0	P

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 91.0

Total Earned JD Program Points: 87.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2021-22	James Kent Scholar	2L

June 13, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I'm writing to recommend Josceline Sanchez for a clerkship in your chambers. To be very honest, Josceline is a diamond in the rough. She came from a humble background: she is the daughter of undocumented immigrants from El Salvador and has close friends and family who have been convicted of serious criminal offenses. She came to law school with a bit of survivor's guilt and has dedicated herself to the study of law in order to work for the public's interest. Compared to other Columbia Law students, Josceline has required more mentoring (but not to a burdensome level). Because she is able to receive forthright feedback and genuinely wants to improve, she has flourished in law school. Her transcript begins with B/B+ average her 1L year and has risen to an A/A- average by her 2L year, which I believe demonstrate her true capabilities.

One of my best decisions last year was to hire Josceline as a TA for my Criminal Law course. Along with my other TAs, Josceline held weekly review sessions and provided written feedback on two writing assignments. In addition, I relied on Josceline in particular for her sense of how well the students were following along in class and how I might teach differently. We had a particularly thoughtful conversation after the class on sexual assault, a topic that I taught for the first time this year (so Josceline did not learn it when she took Criminal Law). She raised the really good point, which wasn't brought up in class, that many perpetrators of sexual violence may have been raised in violent and abusive households and may also have been victims themselves. This is just one of many examples of Josceline's ability to humanize the law and the study of law.

Another example is her Note. Josceline identified her research topic after asking her community contacts what problems they were facing, because she wanted to write a Note that would be helpful to them. Her Note on the constitutional argument for the right to education in state prisons is creative and ambitious as a proposal for reform, which reveals a capacious legal mind. Josceline's main challenge was figuring out how to organize everything she had researched into a concise paper. It took her a few drafts (as it does for many writers), and in the process, her writing improved dramatically.

With the right mentors, Josceline's potential is endless. I truly believe that Josceline would thrive as a law clerk. Please do not hesitate to contact me if you have any questions. It would be my pleasure to be of any assistance.

Sincerely,

Sarah A. Seo

Sarah Seo - as2607@columbia.edu

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is a pleasure to recommend Josceline Sanchez for a clerkship in your chambers. I first met Josceline when she took my Legislation & Regulation course in the Fall of 2021, and her impressive performance has stayed with me. In a lecture hall of 148 students, Josceline stood out at as one of the best-prepared and most thoughtful participants. She brought to class, to office hours, and to her written work an intellectual rigor and passion from which her peers and her teacher greatly benefitted. Furthermore, it was obvious to those around Josceline that her illuminating engagement was driven by a desire not to score points, but to get to the heart of what it means to serve the public interest – whether as an administrator, a litigator, or a judge. As a result, Josceline's fellow students listened to her well-chosen interventions with real curiosity and respect; she lent both clarity and gravity to our discussions.

In light of Josceline's facility in the lecture hall and office hours, I was not surprised to find that she had written one of the finest exams in the class. This exam was an eight-hour take-home, featuring a long, difficult issue spotter and an essay question. Josceline's answer to the issue spotter was masterful. Even many of the best students tend to miss certain subsidiary administrative actions – such as front-line enforcement actions prior to administrative appeals – but Josceline did not. Her answer displayed total control of the ins and outs of the administrative decision-making and a veteran's appreciation for how the case law applies differently in different procedural settings. For the essay question, students could choose to write either on the use of clear statement rules in statutory interpretation, or on the merits of restricting judicial review of agency action to procedural and constitutional validity, as opposed to substantive and interpretive validity. Most students chose the first topic, but Josceline chose the second, and tackled it with creativity and nuance.

I was lucky enough to have Josceline in class again in the Spring of 2022 in Advanced Administrative Law, a course I co-teach with Chuck Sabel. The course's focus is administrative agencies' growing reliance on guidance (as opposed to rulemaking), and the challenges that this development poses for reviewing courts – as well as for defenders of the legitimacy of the administrative state. We ask students to work through a wealth of empirical and theoretical scholarship, and to revisit canonical cases, such as State Farm and Chevron, in light of the guidance revolution. Josceline was a crucial participant in this year's iteration of the course, bringing her legal acumen, her mature appreciation of normative trade-offs, and her experience as a CPA to bear on the material. Her contributions were unique and transformative.

As the foregoing suggests, I have no doubt that Josceline would be a winning addition to your chambers, and recommend her most highly. Please do not hesitate to contact me if I can provide you with further information.

Thank you for your consideration, and best wishes,

Jeremy Kessler
Stanley H. Fuld Professor of Law

Jeremy Kessler - jkessler@law.columbia.edu - 212-854-4947

Columbia Law School

June 14, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Recommendation for Josceline M Sanchez

Dear Judge Walker:

I write to recommend Josceline Sanchez for a clerkship in your chambers. Bright, motivated, and tireless, Josceline's path to this application is reason alone to give her strong consideration. She has my highest recommendation.

I got to know Josceline as the advisor to the Note she submitted to the Columbia Human Rights Law Review. The Note argued for a limited right to higher education for people who are incarcerated. I was skeptical of this argument when Josceline first presented it to me (and she is fully aware of its doctrinal hurdles), but as we hashed out her ideas over multiple sessions in my office, I came around to the creativity and plausibility of the argument. I also came to know better, through Josceline's research, the gap in the magnitude of what would be required for prison administrators to provide these opportunities and the difference it would make in people's lives. Importantly, unlike other putative burdens on prison administration, this intervention would serve the state's rehabilitative goals and not just benefit inmates, an important step in Josceline's argument. What emerged from Josceline's work is an exhaustively researched, well-written, and well-presented argument for a change in the law. Even someone who is not fully persuaded of Josceline's ultimate conclusions will, I predict, be persuaded to reassess their priors about the rights and opportunities available to incarcerated persons. Josceline's Note belongs to the best tradition of innovative, reform-minded, and yet sober-minded advocacy.

Beyond the substance of the Note, the time Josceline and I spent together discussing her ideas left me deeply impressed with her, both as a budding lawyer and as a human being. Josceline is exceptionally bright, intellectually curious, a good listener, and a very fast learner. Perhaps owing to her accounting background (on which more below), she is meticulously organized. She is also humble, empathetic and easy to talk to. She would be a joy to have in chambers.

I also learned more in those office meetings about the inspiration for Josceline's Note topic, and the source of her deep concern for the rights and conditions of people under state supervision. Josceline grew up under exceptionally challenging circumstances. Her parents emigrated from El Salvador shortly before she was born, and both her parents served time in prison over subsequent years. Her mother was deported for her crimes when Josceline was 11 years old, and she died less than a year later. Her father's criminal history made it difficult for him to qualify for legal status and find work. Throughout her childhood, Josceline frequently had to pick up and leave for new neighborhoods, cities, and even states at a moment's notice.

Despite struggling in primary and secondary school, Josceline was able to obtain an associate's degree at Miami Dade College before transferring to the University of Miami to pursue a nascent interest in accounting that a mentor encouraged her to pursue. Josceline went on to work professionally as an accountant between college and law school. While she was in college, a close family friend, just 20 years old, was charged with felony murder and sentenced to 18 years in prison. Her friend's experiences with the criminal justice system introduced Josceline to prison reform advocacy and inspired her to apply to law school.

Josceline's path is not typical of her classmates. As remarkably, it is nearly unheard of for people who travel Josceline's path to wind up with consistent A-level grades at Columbia Law School, in courses like Federal Courts (in just her third semester of law school), Legislation and Regulation, Criminal Law, and a Supreme Court seminar with a Second Circuit judge. Josceline was able to achieve that extraordinary trajectory despite her 1L classes being conducted remotely and therefore lacking the organic learning opportunities ordinarily needed to vault students from humble backgrounds into the top grading tiers.

So when I say Josceline is a very fast learner, I mean it. And when I say she is humble, and curious, and tireless, I mean that too. I am not just happy to recommend her for a judicial clerkship; I am honored to do so.

Please do not hesitate to reach out to me if I can be of further assistance.

Sincerely,

Jamal Greene
Dwight Professor of Law

Jamal Greene - jamal.greene@law.columbia.edu - 212-854-5865

JOSCELINE SANCHEZ
Columbia Law School J.D. '23
(305) 778-0724
Js5797@columbia.edu

WRITING SAMPLE

The following writing sample is my appellate ("mock") opinion for the Fall 2021 Supreme Court seminar for which I was assigned the role of Justice Sonia Sotomayor. My assigned mock opinion was the dissenting and concurring opinion for the case *United States v. Zubaydah* for which the Supreme Court has since issued a final opinion. *United States v. Zubaydah,* 142 S. Ct. 959 (2022).

In *United States v. Zubaydah*, the petitioner was the United States government and the respondent was Mr. Abu Zubaydah. The primary issue litigated by the parties was whether the state secrets privilege precluded the U.S. government from producing any discovery in accordance with Mr. Zubaydah's request under 28 U.S.C § 1782. The District Court held in favor of the U.S. government, holding that discovery was precluded in its entirety. On appeal from respondent, the Ninth Circuit reversed and remanded the case to the District Court, holding that (1) three categories of information were non-privileged and (2) the District Court must use discovery safeguards to determine whether the non-privileged material could be separated from the privileged material. On appeal from petitioner, the Supreme Court granted certiorari.

Because one of our objectives was to respond to the majority mock opinion (written by a different student), my mock opinion includes various references to their specific opinion. The majority mock opinion held judgment in favor of the petitioner, holding that all three categories of information were privileged material protected from disclosure. My complete opinion concurs with a portion of the majority's reasoning as to one of the categories of information and dissents as to the remaining categories of information and the judgement. The following excerpt is the dissenting portion of the opinion.

This mock opinion is entirely my own work and has not been edited by anyone else.

UNITED STATES, PETITIONER v. ABU ZUBAYDAH

JUSTICE SOTOMAYOR concurring in part, and dissenting in part

Today's decision grants the Government's extraordinary request to prohibit all discovery for a claimant who seeks evidence that has been repeatedly declassified and officially disclosed. This denial of justice sidesteps the laws of Congress and ignores the compelling record. The majority all but cedes judicial control of discovery proceedings to Government agencies under the guise of the state secrets privilege—an evidentiary tool that has been repeatedly exploited.

While I concur with a portion of the majority's reasoning, I dissent from the judgment.

I

The nation found itself in a world of fear and panic on September 11, 2001. Thousands of lives were lost and millions more were forcefully uprooted. These events and their immediate aftermath, however, propelled us into a new age of counterterrorism strategies, foreign alliances, and federal agency initiatives under what should have been the watchful eye of our government. One of these early initiatives was the CIA's Detention and Interrogation Program (CIA Program) which was declassified as part of the Senate Select Committee on Intelligence's ("SSCI") investigation into CIA activities in 2014. The full classified report was provided to certain parties in our government as a "warning for the future" and "in the hopes that it [would] prevent future coercive interrogation practices and inform the management of other covert action programs." *SSCI Report* at iv. At the center of the now-decommissioned program was the respondent in today's case and the first detainee ever subjected to the CIA Program, Mr. Aby Zubaydah.

III

For the reasons stated in Part II, I concur in the majority's reasoning that disclosing information that officially confirms or denies the existence a Polish CIA black site or a Polish clandestine relationship would risk harm to national security and is therefore covered by the state secrets privilege. The majority's decision, however, to bar *any* discovery allows the Government to "cast an irrebuttable presumption of secrecy over an expansive array of information in Agency files, whether or not disclosure would be

detrimental to national security, and to rid the Agency of the burden of making individualized showings of compliance with an executive order." *CIA v. Sims,* 105 S.Ct. 1881, 1899 (Marshall, J., concurring).

In *United States. v. Reynolds,* 345 U.S. 1 (1953), we held that "too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses." *Reynolds* at 8. While it is true that even the "most compelling necessity cannot overcome the claim of privilege," this can only be the case when a court has ascertained that "secrets are at stake." *Id*. To aid in its inquiry, a court looks to the showing of necessity to "determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." *Id*. This would mean that a stronger showing of necessity would warrant more careful review of the Government's claim, not less. The Court, today, has failed in its duty to strike this balance and shown that there is "no logical limit" when such "sweeping characterizations" are asserted by the Government. *Mohamed v. Jeppesen Dataplan, Inc*., 579 F.3d 943, 955 (2010).

A

In *Reynolds*, the surviving widows of three civilians who perished in the fire of a military aircraft that crashed while conducting a secret Air Force mission filed federal tort claims against the United States. The widows sought discovery of the Air Force's official accident investigation report and the statements of the three surviving crew members taken as part of the investigation. While the general existence of the flight program and the crash were public knowledge, the Secretary of the Air Force claimed state secrets privilege as production of the documents requested in discovery would disclose "highly technical and secret military equipment." *Reynolds* at 5. The Court noted that such equipment "must be kept secret if [its] full military advantage is to be exploited in the national interests." *Id*. at 10. Therefore, the Court upheld the state secrets claim, finding a "reasonable possibility" that the investigation report would contain references to the secret equipment. *Id*. at 11. Before granting the claim, however, the Court first assessed whether the necessity of procuring the investigation materials in discovery was minimized by an available alternative.

In the same affidavit where the Government asserted its privilege, the Secretary formally "offered to produce the three surviving crew members, without cost, for examination by the plaintiffs." *Id*. at 5. The witnesses would be "authorized to testify as to all matters except those of a 'classified nature.'" *Id*. The claimants, therefore, were allowed to take testimony from surviving crew members, to prove its causation and negligence theory, without risking exposure of the state secrets allegedly contained in the physical evidence. We therefore concluded that the plaintiff's failure to accept the offer led to a "dubious showing of necessity." *Id*. at 11.

On the other hand, in the first state secrets case, *Totten v. United States.,* 92 U.S. 105 (1876), the Court determined that an espionage contract for secret services during the Civil War, between a secret agent and the United States Government, "preclude[ed] any action for its enforcement." *Id*. at 107. Although the Court recognized that the claimant seeking to recover the fee owed per the contract may not have had any other available relief, it dismissed the case. The Court reasoned that further litigation of the alleged contract terms—compensation for secret services rendered—and a potential judgment on the merits could confirm or deny both the existence and the substance of the contract. Not willing to risk disclosure of such sensitive information, the Court dismissed the case altogether.

Totten and *Reynolds* establish the guiding principle that a court should following in assessing any state secrets privilege claim. Where, as in *Totten*, the claimant seeks to litigate or enforce the very state secret itself, even the "most compelling necessity" will not have the courts interrogate the claim of privilege. But where, as in *Reynolds*, the claimant seeks evidence that is distinguishable from state secrets, a court should assess the claim of a state secrets privilege in relation to the showing of necessity or the availability of an alternative to the claimant. Where such is the case, then a state secrets claim that is fairly limited, as it was in *Reynolds*, will likely defeat a weaker showing of necessity. Where the state secrets claim is rather expansive, as it is in the present case, then a court should exercise a more careful review, especially where the showing of necessity is great. Indeed, as the majority acknowledges, the

respondent's showing of necessity defeats the claim of privilege "if he shows that the privilege is weak or does not exist." JH.Ma.1.

In the present case, the claim of privilege and the level of necessity point in opposite directions. Not only is the claim of privilege categorical in nature and inconsistent with prior government action, the respondent also demonstrates a "strong showing of necessity," as the majority rightfully acknowledges. Mr. Zubaydah has been held in an overseas military base since 2012. He will likely never have the ability to personally testify in any legal proceeding. Thus he requests, among other things, testimony from Mitchell and Jessen, former CIA contractors who have previously testified about their involvement with Mr. Zubaydah in CIA black sites as recently as the year 2020. He requests the information for the purpose of assisting Polish prosecutors in their investigation against Polish officials. While not for a domestic claim, the request is critical for judicial relief in a foreign proceeding in which Mr. Zubaydah alleges crimes were committed against him and for which he would be able to personally testify if he was not being held extrajudicially by the CIA. That is the only reason he seeks discovery through § 1782. His necessity is unprecedented in our history. Yet, the petitioners would ask this Court to apply a categorical bar against *any* discovery. This is the opposite of the "compromise" described in *Reynolds*.

Rather than merely accepting the Government's "sweeping assertions," a court should carefully assess categorical claims of privilege that seek to preclude all forms of discovery before we dismiss a request as compelling as the one presented by Mr. Zubaydah. Although I agree that information that could officially confirm the location and identities of foreign partners is privileged, the scope of the Government's claim far exceeds that specific information and extends to all forms of discovery, including information they have not only produced in prior hearings but also officially and publicly disclosed.

B

The majority almost entirely disregards a record which describes clear and delineated categories of information that the Government has publicly acknowledged on multiple occasions do *not* contain state secrets it swore to protect. In their disregard of this official record, the majority "effectively cordon[s] off

all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and limits of the law." *Mohamed v. Jeppesen Dataplan, Inc.,* 579 F.3d 943 (2009).

Unsurprisingly given the public record of the post-9/11 CIA Detention Program, the majority does not take issue with the claim that details pertaining to Mr. Zubaydah's treatment and conditions of confinement are almost entirely non-privileged information. Instead, the majority argues not only that this information can reveal privileged facts, but that nearly *any* fact might allow for the construction of a "mosaic," from which privileged facts could be inferred. The majority raises the following hypothetical: "non-public medical technology" could properly be claimed as privileged because such technology could be limited to secret government operations, and disclosure might risk the security of the secret locations where said operations take place. But the Government has not even come close to this position. JH.Ma.1. The Government has not claimed that all requested categories of information are classified or of a confidential nature—it would be disingenuous to make such claims given that much of this information has been previously disclosed in a public Congressional hearing and other public proceedings. Rather, it stated that it "determined [] certain categories of information—including the identities of its foreign intelligence partners and the location of former CIA detention facilities in their countries could not be declassified without risking undue harm to national security." Pet. Br. 3. Pet. App. 124a & n.1, 126a, 129a-130a. Indeed, "[the Government] [] declassified a significant amount of information regarding the former CIA program, including the details of Abu Zubaydah's treatment while in CIA custody, which included the use of enhanced interrogation techniques (EITs)." *Id*. The Government's state secrets claim, however, goes well beyond this privileged material and touches upon information that is no longer secret.

Contrary to the Government's assertions, this Court, in *Reynolds*, recognized that the "secret military equipment" at the heart of the case was actually a secret. If the Court would have had reason to believe that military secrets had been officially disclosed—as they actually were nearly half a century later—then any risk the Government claimed existed would have been realized in such disclosure. Our decision was in relation to the nature of the "highly technical and secret military equipment" that the Air

Force thought should remain secret for purposes of an effective military defense. See also *Totten v. United States*, 92 U.S. 105 (1876) (holding that the "secrecy which [espionage] contracts impose precludes any action for their enforcement.")

C

The Government is correct, however, in that they are owed deference with respect to what constitutes secret information. It is, after all, information in their possession, and they are more aware of the risk disclosure would present, "as judges are not." *Sims* at 179. As the respondent properly notes, however, this argument is nevertheless inconsistent with their claim to preclude all forms of discovery.

In 2017, the Government played an important role in the depositions and proceedings against the defendants in *Salim*, Mitchell and Jessen, regarding almost identical information about the CIA Program. *Salim v. Mitchell*, No. 2:15-cv-286-JLQ (E.D. Wash. 2015). Instead of producing documents requested in discovery, the Government submitted a Status Report Addressing Document Production and Statement by the United States Addressing Redactions to Documents Produced in Response to Defendant's Subpoenas ("Status Report"). 2016 WL 7046256 (E.D. Wash. 2016). The Status Report provided the court with the CIA's rules and guidelines for what categories of information were precluded from production pursuant to various exemptions and privileges. Their "uniform system for classifying, safeguarding, and declassifying national security information" was based on the classification guidance provided by Executive Orders which may be revised pursuant to additional declassifications or Executive Branch guidance. *Executive Order 13526*, Classified National Security Information, 75 Fed. Reg. 707 (Dec. 29, 2009) (governing classification of information generally). Additional executive guidance governing the CIA Detention Program relates to "categories of information about the program that remain classified, as well as categories of information that are currently unclassified" or that have already been "declassified and produced in connection with the [Freedom of Information Act] cases." *Id*. at 1. The specific categories of evidence excluded in *Salim* were the "names and [the] identifying information of CIA and military personnel; information regarding the location of CIA detention facilities and identifying information

about those facilities to include physical and operational descriptions; codenames for classified CIA intelligence programs" and other specific categories that would risk privileged disclosures. *Id*. at 2.

It would surely follow from this past instance alone that the procedural safeguards related to the CIA Program could allow for safe depositions which would not expose state secrets given the fact that "60 responsive documents, totaling approximately 900 pages" had been produced by Mitchell and Jessen, both of whom were also subject to direct and cross-examination at the *Salim* deposition. *Id*. at 1. The Government explained that their "approach expedited production of responsive documents to Defendants and also avoided the burdens and time associated with re-reviewing and re-processing documents that had already been authorized for public release." *Id*. Included in the responsive documents was a detailed report that contained (1) information about the "capture and detention of Abu Zubaydah" and (2) other documents that provided "material information about Defendants' involvement in the development of the program, the interrogations of Abu Zubaydah," detention and interrogation techniques at the "COBALT facility where Plaintiffs were detained," and other specific information. *Id*. at 3. Per the trial court's order, the Government had the discovery obligation to produce certain categories of CIA documents including "documents that reference one or both of the Defendants *and* Abu Zubaydah" with dates ranged from September 11, 2001 to August 1, 2004, a total of 36,000 documents. *Id*. at 6. The Government stated that it was reviewing and would continue to review those documents on a "rolling basis for classification and privilege review and, if appropriate, redaction." *Id*. at 7. These assertions were made in October 2016.

Though it is commendable that the Government has made this good-faith showing in the past, it is troubling that they refuse to even produce documents that they produced for discovery before and other documents that have been designated as non-privileged by the proposed production date.[1] The majority's blatant disregard of this record is mistaken, and largely premised on this Court's decision in *Sims* and the D.C. Circuit decision in *Fitzgibbon v. CIA,* 911 F.2d 755 (D.C. Cir. 1990). It is important to address

[1] See Defendant's Statement Re Deadline for U.S. Document Production in *Salim*, 2016 WL 8710658, proposing a 2017 deadline for production.

important distinctions from those cases that both refute a significant portion of the Government's claim of privilege and that support the respondent's assertion that accepting the Government's claim would "shield its privilege assertions from any review." Res. Br. 46.

D

In *CIA v. Sims*, 471 U.S. 159 (1985), the director of the Public Citizen Health Research Group sought the "names of the institutions and individuals who had performed research" under a CIA intelligence research project that was vital to our counterterrorism efforts against foreign nations. The Government denied various requests, claiming that Exemption 3—a statutory exception that precludes certain requests made under the Freedom of Information Act (FOIA)—and which protected the material from disclosure.[2] We afforded the government "great deference" with respect to the identities of intelligence sources it claimed could not be disclosed without risking their confidentiality. *Id*. at 179. Because we, as judges, do not have the capacity to determine whether an "[a]gency actually need[s] to promise confidentiality in order to obtain the information," we should not compromise the security of intelligence sources even if we could determine, after the fact, that the Agency did not need to rely on the source for intelligence gathering. *Id*. at 176. We also held that in order to effectuate this end, the CIA Director had the authority to withhold even "seemingly innocuous information" that might allow someone to discover protected identities. *Id*. at 178.

In addition to the misplaced reliance on *Sims*, the majority also cites to *Fitzgibbon v. C.I.A.*, a decision in which the United States Court of Appeals for the D.C. Circuit relied on *Sims* to strike down an FOIA request made by a historian studying the disappearance of a Spanish politician. *Fitzgibbon v. C.I.A.*, 911 F.2d 755 (1990) (explaining that the claimant in that case sought information that the Government asserted could compromise intelligence sources and methods as it did in *Sims*). While a cursory review of these two cases supports the Government's argument that all information should be excluded simply

[2] The CIA produced, however, in connection with the initial FOIA request, several responsive documents it did not find were protected under Exemption 3.

because the Government claims it should be, the matters in this case have been made far more public than those in *Sims* and *Fitzgibbon*. The majority's failure to recognize this distinction dangerously expands the state secrets privilege beyond what this Court carefully set as its limit in *United States v. Reynolds*.

1

As an initial matter, the claimant in the present case is not requesting discovery under the FOIA and therefore no exemption can be claimed by the CIA. It is notable, however, that if such information could have been requested under the FOIA, the Court's review would be based on Exemption 1, not on Exemption 3 as was the discovery in *Sims* and *Fitzgibbon*.[3] This distinction is an important one considering Congress' clear and unambiguous efforts to preserve judicial review when Exemption 1 was invoked. In such cases, an agency must make individualized showings to the reviewing court.

If Mr. Zubaydah was able to make this request under the FOIA, he would likely be afforded proper judicial review the Government's claims to privilege. His request, in such a situation, would fall under Exemption 1 which, unlike Exemption 3 in *Sims*, is the governing Exemption to disclosing the information related to the CIA Program in question today. Exemption 1 has been carefully tailored to allow deference to the Executive Branch while preserving the federal courts' ability to exercise judicial review. Indeed, "[a]gency decisions to withhold are subject to *de novo* review in the courts, which must ascertain whether documents are correctly classified, both substantively and procedurally." *Sims* at 183 (Marshall, J., concurring). Naturally, there is disagreement among the lower courts as to how strict review should be for matters of national security and foreign affairs. But we should note that Congress overruled not only our decision in *EPA v. Mink*, 410 U.S. 73 (1973) but also a Presidential veto when they amended Exemption 1 to explicitly allow for such judicial review into these matters. *Id*. at 189. This clear Congressional statement was against the backdrop of the carefully investigated and publicly declassified

[3] the CIA Detention Program is governed by Executive Orders for purposes of their classification and review

CIA Rendition Program. Today, however, the majority distorts this record and allows for the acquiescence of the Judicial Branch to the Executive Branch.

2

Secondly, unlike the security risks presented in *Sims* and *Fitzgibbon*, the locations and identities of foreign countries, and any "seemingly innocuous information" can remain safely guarded. Congress has acknowledged as much: The Congressional committee, at the CIA's request, redacted even from the *classified* SSCI report "the names of countries that hosted CIA detention sites thereby safeguarding that highly classified information." Pet. Br. 15. The Government's skillful litigation strategy does not go unnoticed. Its brief is riddled with conclusory remarks that its categorical claim of privilege is justified because of the need to protect the identities of its foreign partners, providing virtually no justification for Mr. Zubaydah's other discovery requests. Moreover, the Government has successfully determined, on at least three occasions, what information has the power to reveal the privileged material: the identities and locations of its clandestine relationships, and has successfully protected any compromising information.

The Government has, as described above, submitted status reports that demonstrate that the Government completed its due diligence, identifying various factors and specific classes of information that would present an unjustifiable risk. If *all* documents related to the CIA program did present such a high degree of risk, then one would not be able to access the ten transcripts of Mitchell and Jessen's testimony—totaling almost 2,000 pages—which are available on the public military commission website. *United States v. Khalid Mohammad, et al*.[4] One also wouldn't have access to the thousands of pages of unclassified notices, documents, and exhibits that are designated "for public release." *Id*. The Government, surely, must have considered what information would enable billions of internet users to deduce the privileged information that ought to be protected.

[4] Transcripts available at https://www.mc.mil/. Mitchell and Jessen testified from January 21, 2020 to January 31, 2020.

The Government has also allowed Mitchell and Jessen to disclose non-privileged information, without claiming that such disclosures would breach the confidentiality of foreign partners. Mitchell and Jessen were allowed advance review of the documents describing the events they would be questioned about. *Salim*, 2016 WL 8710658. They were also prepared, in advance of the proceedings, allowed to review the details of classified information they were not allowed to disclose. *Id*. In some instances, depositions were limited to written questionnaires first and oral depositions second. *Id*. In other instances, they conducted "motion practice" to resolve any objections to answers that may contain privileged information. *Id*. This precedent cannot be so easily ignored, despite the majority's inclination to do so.

These classes of information are not nebulous nor do they have an uncertain nature that would justify the majority's neglect of judicial review, especially considering that two of these proceedings were of a familiar kind—one in a federal district court and the other in a military commission. This information has also been publicly disclosed through both legal databases and public websites. Indeed, even "apparent deference" would suggest the Government is capable of granting some the discovery requests, without jeopardizing the privileged content. Pet. Br. 17. Although the majority acknowledges these prior testimonies and disclosures, their cursory review distorts the record in favor of the Government.

IV

A

While the respondent initially requested information with a particular interest in the "involvement of the local, Polish citizens," respondent ultimately understood that this information was subject to privilege, per the Government's claim. *In Re Zayn*, No. 2:17-CV-0171-JLQ at *8, *4 (E.D. Washington 2018) Respondent further explained that "valuable discovery may proceed without requiring [the Government] to confirm either the location of any particular site, or the cooperation of any particular government." *In Re Zayn* at *8, *4. To this end, the District Court rejected the Government's motion and held that "rewrite[ing] the subpoenas to seek non-privileged information" could avoid a claim of the state secrets privilege. *Id*. at 9. (explaining that the "[t]he Court can modify or limit the scope of the

subpoena.") Nevertheless, our decision in *Reynolds* would also affirm the District Court's stipulation. Our ultimate holding was to remand when "it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon [state] secrets." *Reynolds* at 11.

Although Mr. Zubaydah's request is not made for purposes of proving negligence, nor even for a case in a United States court, the request is not of lesser importance as the Government would have the Court believe. The evidence is sought for purposes of proving unlawful conduct that allegedly caused harm to Mr. Zubaydah. There is no reason we must accept one purpose and ignore another equally valid purpose which decidedly weighs in favor of the necessity of disclosure. Section 1782 is the statutory vehicle which allows us to ascertain these reasons for the discovery claim. Past experience demonstrates that relevant testimony and documents can be, and have been, safely disclosed without jeopardizing privileged information. The majority does not review this crucial history that is not only demonstrative of a successful disentanglement but also too recent and relevant to ignore.

1

Between 2009 and 2014, the SSCI conducted a "comprehensive review" of the former CIA program. The full 6,700-page report was summarized into a nearly 800-page[5] Senate Report that was further declassified and published by the Government in 2014. It provides details about specific interrogation methods, 12 to be exact, used against Mr. Zubaydah. The Senate Report details a timeline of information similar to the information sought here without ever disclosing the privileged information that has been historically protected. Pet. Br. 6. Not only does the majority acknowledge this comprehensive investigation, it also acknowledges the book released by Mitchell and Jessen which also publishes significant portions of the Senate Report concerning the interrogation methods used against Mr. Zubaydah. The majority, however, manages to disregard the significance of these disclosures and all but ignores the lengthy pieces of testimony that Mitchell and Jessen have provided in subsequent years.

[5] SSCI Report, December 2014, https://www.intelligence.senate.gov/sites/default/files/documents/report_volume5.pdf

2

The official record, as authorized and disclosed by the Government, has continued to evolve over the past four years. In 2017, Mitchell and Jessen testified, in great length, as defendants to the *Salim* case. They provided details pertaining to the treatment of former CIA detainees, including Mr. Zubaydah. They described the timing of their visits to certain black sites, the interrogation methods used on Mr. Zubaydah including "sleep deprivation and dietary manipulation," the details regarding when Mr. Zubaydah was transferred to another site, and their reluctance to the continued "tortur[ing]" of Mr. Zubaydah despite their professional assessment that such methods were ineffective. The Government does not dispute this. Res. Br. 28. (C.A.E.R. 114-49). In fact, the Government declassified, produced, and allowed Mitchell and Jessen to testify about similar information three years later in a Military Commission trial.

3

Mitchell and Jessen provided testimony, as defense witnesses in the Military Commission trial *United States v. Khalid Shaikh Mohammad*,[6] over the span of 10 days from January 21 through January 31, 2020. They testified on both direct- and cross-examination about the "design of the RDI [Rendition, Detention, and Interrogation] program," their "observations of and/or participation in interrogations of the Accused," and the application of enhanced interrogation techniques.[7] Mitchell testified, in accordance with his book, about the appearance of detainees and their physical and emotional reactions to specific interrogation techniques. The trial transcript the Government cites to in its brief expressly states that Mitchell and Jessen were allowed to testify as to the "internal construct of a black site, what was being used, what it looked like, and what the internal" features appeared like.[8] The Military Judge concluded that despite the fact that the evidence was being provided for an "adversarial" proceeding, "[the

[6] See, e.g., 1/21/2020 Tr. at 30164, *United States v. Khalid Shaikh Mohammad* (Military Comm., Guantanamo Bay, Cuba), https://go.usa.gov/xMx35

[7] Id.

[8] *Id*. at 30164-30166.

Government] shouldn't have over-classification [] for stuff that's clearly been declassified for significant periods of time."[9] Indeed, this balance is what this Court has also held to be the objective of the judiciary in assessing a state secrets privilege. In *Reynolds*, we recognized that "too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses." *Reynolds* at 8. The majority's decision today undeniably falls into the latter.

Even more notably is the fact that the decisions of the District Court and the Circuit Court pre-dated the 2020 Military Commission case, a case so recent it remains the first decision on the Military Commission website as of November 2021.[10] Naturally, the lower courts cannot be faulted for not considering events that occurred *after* their adjudication; the same cannot be said for this Court, which cannot close its eyes to relevant subsequent developments. But it is against this record that the Government asserts a categorical claim of the state secrets privilege, advancing the false proposition that disclosure of any discovery necessarily confirms a Polish partnership. This bold assertion is wholly opposite to the stance taken in *Salim* where the Government asserted the privilege only after discovery was underway for several months and for which they asserted "various privileges as to specific documents." *In Re Zayn* at *8.

V

It is important to assess the credibility of the Government's most problematic claim that "any disclosure would necessarily confirm the existence of a Polish black site" and which the majority blindly accepts to be true. JH.Ma.1 Whatever the basis for this assertion, whether it be based on the mere "appearance" of a breach of trust or the "classified mosaic" theory, the mere production of discovery to a district court could not possibly present substantial risk. The risk of disclosing privileged material is only realized if the evidence was actually provided to anyone outside a United States court. The District Court,

[9] *Id*. at 30167

[10] Office of Military Commission, Cases, https://www.mc.mil/cases.aspx

however, is not the respondent nor the Polish prosecutor, and there is no risk in an initial disclosure to a federal court.

A

Production to the District Court is warranted by the wealth of production that occurred in *Salim*. If the Government has already produced some of the discovery requests under protective court orders, it cannot be true that doing so again would risk disclosure of state secrets; if disclosure to judicial officers did not pose an unjustifiable risk then, how can it present such a risk now? On the other hand, if production were to proceed under protective orders, the District Court would have the opportunity to separate the privileged from the non-privileged information.[11] These discovery mechanisms would surely allow for a safe review and provide a viable path forward as compared to following the majority which, in its infinite wisdom, boldly concludes that disentanglement is not possible.

B

The majority's review is also concerning considering that the requested discovery is not for purposes of domestic litigation. It recognizes that a valid claim of privilege "requires outright termination of the case" in cases where it is "impossible to proceed with the litigation because—privileged evidence being inseparable from non-privileged information that will be necessary to the claims or defenses—litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets." *Mohamed v. Jeppesen Dataplan, Inc*., 614 F.3d 1070, 1083 (2010). But if this is indeed the case, then the necessary assumption is that there must be litigation in which claims or defenses can be presented in the first instance. The majority's decision to overlook this premise is also misguided.

The majority and the Government have operated on contradictory logic throughout this case. The Government claims that nongovernmental sources that allege Detention Site Blue was the Poland site are

[11] Though it should be noted that for purposes of physical evidence, the Government must have surely completed or almost completed this disentanglement in *Salim* and the numerous FOIA cases litigated in the past two decades.

alleging only "rumors" and "speculations," and should be "properly understood 'as being of uncertain reliability.'" Pet. Br. 31 (citing to *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1368, 1370 (4th Cir.), cert. denied, 421 U.S. 908, and 421 U.S. 992 (1972)). In the same brief, however, it asks this Court to take such rumors and speculations as the primary justification for excluding *all* discovery. If nongovernmental findings that Detention Site Blue was a Poland site have "uncertain reliability," then non-privileged information cannot "necessarily disclose" the existence of a black site in Poland. For all we know, and according to the Government who can neither confirm or deny this fact, there were no detention cites in Poland. Perhaps Detention Site Blue was in Iceland. The fact is, there has been no official confirmation of the locations or foreign partners for *any* of the CIA black sites. To assume otherwise, would require giving credence to sources the Government argues should not be trusted.

I do not mean to suggest that Polish prosecutors cannot prove Polish complicity by their own independent means; a foreign government is always free to investigate within its sovereign borders and to make findings that may be unfavorable to the interests of the United States. It, therefore, cannot follow that the source of the request is the dispositive fact that would make proper or improper a state secrets claim. Rather than evaluating if there are any state secrets at stake, our inquiry would be reduced to questions of appearance and the risk of embarrassment. Indeed, this precedent would have "no logical limit." *Mohamed v. Jeppesen Dataplan, Inc.,* 579 F.3d 943 (9th Cir. 2009), on reh'g en banc, 614 F.3d 1070 (9th Cir. 2010). But this Court established one limit: when the Government can protect all privileged facts and any attendant facts, then any remaining non-privileged facts are not subject to the state secrets privilege. *Reynolds* at 8. (remanding to lower court to allow for discovery alternatives).

C

The majority fails to realize that the nature of Mr. Zubaydah's request is limited to only the discovery proceedings that would allow for safe containment of privileged material—as the Government has done thrice before. Our governing principle was announced in *U.S. v. Totten*, where this Court held

that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." *Totten* at 107.

The reason the state secrets privilege allows our courts to forbid a suit in our jurisdiction is because *our* state, and those within it who possess its secrets, are subject to the litigation and judgement. Their necessary involvement, if the suit were to proceed, unacceptably risks the disclosure of privileged information, whether through claims or defenses, or a potential judgment on the merits. This is the entire point of the state secrets privilege which, as the Government acknowledges, "belongs to the Government alone and cannot be waived by a private party." Pet. Br. 17. But, the Government, and private parties who possess its secrets, have no involvement in the foreign proceeding; the involvement ends in a domestic discovery proceeding and, therefore, the risk of subsequent privileged disclosures.[12]

The respondent's request is for the purpose of a Polish proceeding investigating alleged Polish conduct which relates to CIA activities that the CIA disclosed to the public eight years ago—yes, the "cat is out of the bag." JH.Ma.1. The evidence sought is not "evidence compelled under oath from government officials knowing the actual facts." Pet. Br. 31. This is not a "suit against the Government based on covert [matters]." *Tenet v. Doe*, 544 U.S. 1 (2005). The Polish prosecutors are not even pursuing liability for crimes committed by or suing any individual (or entity) in our jurisdiction. Rather, they were tasked by the ECHR to investigate certain Polish conduct. Disclosure of confidential matters, therefore, cannot occur where the parties—capable of disclosing such matters—are not implicated in the process in which they may have to disclose such matters.

The concern that Poland's prosecutors may "expose[e] the classified 'mosaic,'" is not irrelevant as the Ninth Circuit proposed; it is simply not a risk when the "mosaic" was exposed by the United States itself. JH.Ma.1. As it relates to the identities and locations of foreign partners, the classified "mosaic" was protected by the Executive Branch when it successfully protected any compromising information in prior

[12] It is important to note that Mr. Zubaydah likely also possess privileged information, but he is not capable of disclosing that information given his status as a United States detainee.

proceedings and when such information can remain protected when future foreign proceedings would not involve anyone who actually possessed privileged information—as they did in *Reynolds*, *Totten*, *Mohamed*, and *Salim*.

The foreign proceeding may certainly reach a judgment on the merits, in the manner and to the extent for which Polish laws allow, but their findings and a potential judgment are not a disclosure of *our* state secrets, much less United States confirmation of a clandestine relationship. Any non-privileged information we could have provide them with would have been limited in its contributions to the desired outcome of the prosecutors. Any findings they would have independently made before or after having received such information could not have had the effect of an official confirmation—as the Government has asked this Court to accept as true.

D

I finally address the Government's last argument about preserving an "appearance of confidentiality" and what the majority cannot admit in its judgement but which clearly looms in the shadow of their opinion.

In papering over the true nature of the Government's claim, the majority has all but ceded judicial control to the Government. The purpose of the respondent's request is to assist Polish prosecutors who seek to investigate certain Polish officials for their alleged complicity in the crimes committed against Mr. Zubaydah by the CIA. It is all but certain that we can provide them information, without "touching upon [state] secrets." *Reynolds* at 11. Yet, the majority refuses to allow even the preliminary discovery determination because doing so would taint the "appearance" and "assurance" of confidentiality that the Government promised its foreign partners.

The Government's claim of harm does not deal with the actual breach of confidentiality or appearance of breach for which we raised legitimate concerns in *Sims*. Rather, the Government's real concern is that certain Poland officials may be held accountable by their country, for reasons that I am sure are classified. But we cannot, as a judiciary, mend the relationship of the CIA's alleged foreign

partnerships; we can only apply the laws Congress has entrusted us with. It is certainly unfair to Polish officials if they were indeed complicit but unaware of the true nature of the CIA operation they allowed within Polish borders. If this is the case, then the United States breached Polish officials' trust nearly twenty years ago, and this Court cannot distort nor disregard federal laws to salvage the wreckage left by the Executive Branch.

The request Mr. Zubaydah made was one entitled to review under § 1782. It allows for foreign governments and tribunals to seek discovery from our courts when they are unable to obtain such discovery—such as when one of their main witnesses and victims is detained by the U.S. government. Regardless of any unfavorable or embarrassing appearances that Mr. Zubaydah's request might have, the request is in light of what the ECHR believed was the responsibility of Poland enforcement officials to investigate human rights abuses as such abuses might pertain to *their* government. While the state secrets privilege serves to protect information that would directly prove any Polish complicity, this Court had the obligation to at least determine whether some evidence was not privileged and, therefore, not protected from disclosure. To this end, it would serve the majority to remember the aftermath of our decision in *Reynolds* when this Court accepted what was at least a more reasonably valid claim of privilege:

On remand, the surviving family settled with the government for less than what the District Court's original verdict awarded. Eventually, in 2000, the Government declassified the official investigation report. Contrary to the Government's nearly 50-year-old claim, it did not refer to any "highly technical and secret military equipment." Instead, it contained information about a common aircraft and demonstrated gross negligence, concluding that the cause of the crash was an engine failure that may likely have been prevented if the government had complied with inspection orders that were dated well over a year prior to the accident. *Herring v. United States*, WL 2040272 at *8.

Today's decision denies Mr. Zubaydah far more and as a result of far less. He cannot settle with any government, American or Polish. The crimes committed against him, whether or not during a time of unprecedented fear and uncertainty, have been described in vivid detail and span the thousands of pages

generated by numerous investigations, lawsuits, and trials, but *none* of which were at the request or for the benefit of Mr. Zubaydah. As the Ninth Circuit rightfully noted, the obligation of a court was to make the preliminary discovery determination about the possible disentanglement between privileged and non-privileged material. This Court also had the obligation to provide Mr. Zubaydah's request a meaningful review. We fail that mission today.

I dissent.

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March 24, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
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Dear Judge Walker,

I am a third-year law student at Georgetown University Law Center. I am writing to apply for a judicial clerkship in your chambers for 2024 and all other terms. I have a strong interest in the criminal law. I graduated from community college in the Tidewater region. My brother is stationed in Portsmouth. I would be honored to serve as your clerk.

As a reporter for the Casper (Wyoming) Star-Tribune, I followed criminal and civil matters, including more than a dozen trials. Exposure to litigation practice led me to law school. I have since developed my professional interests and competencies during two semesters as an intern with the Federal Public Defender for the District of Columbia and during my summer with Dechert LLP.

Nearly all the legal research and writing I have performed has pertained to active litigation in federal courts. While a journalist, I developed comfort writing on deadline, working under time pressure, and managing disparate tasks in creating public-facing work. My high standards and attention to detail will enable me to contribute to the work of your chambers.

I have included a resume, a writing sample, a law school transcript, and recommendations from Assistant Federal Public Defender Tony Axam, Professor Shon Hopwood, Professor Michael Pardo, and Professor Carlos Vázquez. Thank you for your time and consideration. If I can supply any further information in support of my candidacy, please do not hesitate to contact me at 573.355.2979 or ss4436@georgetown.edu.

Best regards,

Shane Sanderson

SHANE SANDERSON

329 Elm St. NW, Washington, DC 20001 • (573) 355-2979 • ss4436@georgetown.edu

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER — **Washington, DC**
Juris Doctor — Expected June 2023
GPA: 3.69/4.00
Activities: *Georgetown Journal of Legal Ethics*, Executive & Submissions Editor; Christian Legal Aid of DC, volunteer.
Honors: Dean's list (both semesters 1L); Pro Bono Pledge honoree (expected on conferral of degree); Merit scholarship.
Publication: Shane Sanderson, Note, *Drawing a Portrait of Confidence: One Resolution to Legitimate Voter Concerns in the Shadow of Illegitimate Violence*, 35 GEO. J. LEGAL ETHICS 1117 (2022).

UNIVERSITY OF MISSOURI — **Columbia, MO**
Bachelor of Journalism; Emphasis in Data Journalism for Print and Digital News — May 2017
Honors: Sam Bronstein Scholarship; Jeanne & David Rees Scholarship; Raymond J. Ross Scholarship

COLLEGE OF THE ALBEMARLE — **Manteo, NC**
Associate in Arts — December 2014

EXPERIENCE

DECHERT — **Philadelphia, PA**
Incoming Litigation Associate — Expected November 2023
Summer Associate — May 2022 – July 2022

- In federal trial of pro bono matter, *inter alia*: summarized potential cross-examination faced by client on the basis of his first-day testimony and proposed modes of rehabilitation; researched case law for potential *Batson* challenge; drafted portions of motion *in limine*; and drafted and delivered opposing counsel moot opening statement and closing argument.
- Wrote internal memoranda for circulation to litigation team on product liability matter set for trial in August. Redrafted memoranda for presentation to client advising trial strategy following opposing counsel's release of relevant discovery.
- Drafted questions used in deposition of adverse expert witness expected to testify regarding remedies.

FEDERAL PUBLIC DEFENDER — **Washington, DC**
Appellate Intern — Sept. 2021 – April 2022

- Wrote first draft of successful motion for relief in District Court on Sixth Amendment grounds resulting in the court's identification of error in jury selection process and corresponding modification of procedures for the District.
- Drafted pre-trial motions, portions of sentencing memorandum, and portions of habeas corpus petitions to District Court, as well as portions of certiorari petition filed with U.S. Supreme Court.
- Investigated novel questions of law and drafted summaries of relevant persuasive authorities for reference in client consultation and drafting of appellate briefs, habeas corpus petitions, and probation revocation arguments.
- Conducted preliminary statistical analysis of jury panel demographics to prepare litigation of Sixth Amendment issue.

CALIFORNIA APPELLATE PROJECT — **San Francisco, CA**
Habeas Intern — June 2021 – Aug. 2021

- Reviewed trial record, client communications, newly developed evidence, relevant scientific literature, and appellate attorney documentation to identify potential issues for state habeas corpus petition in death penalty case.

CASPER STAR-TRIBUNE — **Casper, WY**
Criminal Justice Reporter — Aug. 2017 – July 2020

- Researched and reported articles totaling more than 5,000 words, drawing on thousands of pages of court and administrative documents and hours of in-person interviews.
- Independently pitched and implemented a redesign of the paper's criminal justice coverage, reorienting the section toward in-depth narrative, investigative and accountability journalism.
- Honored with the Wyoming Press Association's first place award in general news and the Associated Press Sports Editors' national investigative prize, ranking alongside contestants from ESPN.com, USA Today and Yahoo Sports.

KANSAS CITY STAR — **Kansas City, MO**
News Reporting Intern — June 2017 – Aug. 2017

COLUMBIA MISSOURIAN — **Columbia, MO**
Assistant City Editor — Dec. 2016 – May 2017
Public Safety Reporter — Jan. 2016 – Dec. 2016